TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 55.

CHARLES H. MOYER, PLAINTIFF IN ERROR,

vs.

JAMES H. PEABODY, SHERMAN M. REED, AND BULKELEY WELLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED APRIL 3, 1908.

(20,851.)

(20,651.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 272.

CHARLES H. MOYER, PLAINTIFF IN ERROR,

vs.

JAMES H. PEABODY, SHERMAN M. BELL, AND BULKELEY WELLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on to-wit, the eleventh day of March, A. D. 1905, came Charles H. Moyer, by John H. Murphy, his attorney, and filed in said court his complaint; and sued out of and under the seal of said court a writ of summons against James H. Peabody, Sherman M. Bell and Bulkeley Wells. And the said complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Complaint.

The plaintiff, Charles H. Moyer, complaining of the defendants and for a cause of action against James H. Peabody, Sherman M. Bell and Bulkeley Wells, defendants in the above entitled cause of action, alleges:

First. That the said plaintiff is, and was during all of
2 the time mentioned in this complaint, a citizen of the United States and a citizen and resident of the State of Colorado; that the said defendants also are, and were during all the time mentioned in this complaint, citizens of the United States and citizens and residents of the State of Colorado, but the said plaintiff brings this action in this court against said defendants under Section 1979 of the Revised Statutes of the United States by reason of the fact, as will more fully appear hereinafter in this complaint, that the defendants, under color of some statute of Colorado and under certain regulations, customs and usages thereof, subjected this plaintiff to the deprivation of rights, privileges and immunities secured to him by the constitution and laws of the United States.

Second. That at the general election, held in the State of Colorado on the 4th day of November, A. D. 1902, the defendant, James H. Peabody, was elected Governor of the State of Colorado; that he duly took and subscribed the proper oath of office and filed the same in the Office of the Secretary of the State of Colorado, and entered upon the discharge of his duties as Governor on the 13th day of January, 1903, for a term of two years ensuing from said date; that thereafter he appointed the defendant, Sherman M. Bell, as Adjutant General of the National Guard of the State of Colorado, and the defendant, Bulkeley Wells, as a captain of a company thereof. On or about

the 23d day of March, A. D. 1904, the said defendants,
3 James H. Peabody, as Commander in Chief of the State Militia, and the said Sherman M. Bell, as Adjutant General thereof, directed and caused a portion of the said National Guard of Colorado to assemble in the City of Telluride, San Miguel County, State of Colorado, and that said National Guard while so assembled, was under the direction and control of James H. Peabody as Commander in Chief thereof, Sherman M. Bell as Adjutant General and Bulkeley Wells as captain thereof.

Third. That on or about the 30th day of March, A. D. 1904, the said defendants, acting as officers of said National Guard and under color of authority of the statutes, regulations and customs or usages of said State of Colorado, caused a squad of men, a part of and composing said National Guard, who were at the time under their control and direction, to arrest the plaintiff herein and imprison him in a place commonly designated as the City Jail, in the Town of Telluride, County of San Miguel, State of Colorado, and thereafter confined him forcibly and against his will, except during a short period of time during which they took him as a prisoner to other points, from about 8:05 A. M. of said 30th day of March, A. D. 1904, until the hour of about 3:45 P. M. of June 15, A. D. 1904, restraining
him, the said plaintiff. with force and arms, of his liberty
4 and subjecting him to hardships, privations, humiliations and disgrace; that the arrest and imprisonment of the said plaintiff, as aforesaid, was without probable cause and also without legal process or color thereof and not in due course of law; that his arrest and imprisonment, notwithstanding the action of the defendants under the guise and color of law of said State, was contrary to the constitution and laws of the United States, and that the course and conduct of the defendants and each of them, was in wanton and reckless disregard of the rights of plaintiff and wholly without justification of law.

Fourth. That during all of the time mentioned in said complaint the plaintiff if he had committed any crime or if any person saw fit to charge him with a crime, the constitution and laws of Colorado require that he should be informed of said charge under oath or affirmation; that he should have the right to appear in court and defend in person or by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf and a speedy and public trial by an impartial jury in the district in which the offense is alleged to have been committed; that to give any person who it is alleged has violated any law or who it is believed has violated any law the privileges and immunities of citizens of the United
States, due process of law and the equal protection of the law
5 they should be and must be proceeded against in accordance with the aforesaid requirements and provisions of the laws of Colorado. That at no time was there any complaint, under oath or affirmation, lodged or filed in any court of competent jurisdiction against this plaintiff, and during all of the time he was prevented from having access to the courts of said State, from the privilege of

demanding in any court of competent jurisdiction the nature *of* the cause of the accusation, from meeting witnesses, if any, against him, face to face, and from having a speedy and public trial by an impartial jury of the county and district in which any alleged offense or supposed offense was committed by him. That during all the time of the arrest, detention and imprisonment the courts of the State were open and in the undisturbed administration of justice, except in so far as the defendants prevented said courts from administering judicially the law of the State.

Fifth. The plaintiff is not and was not during any of the time mentioned herein a member of the National Guard of the State of Colorado, or in any way subject to its rules and regulations. That from and during the imprisonment of the said plaintiff he was compelled to stay most all of the time in said City Jail of Telluride and an armed guard or guards were constantly kept near and about him. That the said jail was damp and unwholesome, and by reason thereof the said plaintiff contracted an illness which greatly impaired and shattered his health, from which he still suffers
6 very greatly. And that by reason of said false arrest, imprisonment and detention the said plaintiff suffered great humiliation of mind and mental anguish which also tended to impair and did impair his health, and from which impairment of health he still suffers. On account of all which wrongful acts, as aforesaid, of the said defendants, the plaintiff has been damaged in the sum of one hundred thousand dollars ($100,000.00). That the wrongful acts committed by the defendants, as aforesaid, deprived the plaintiff of privileges and immunities as a citizen of the United States, of his liberty without due process of law and denied to him the equal protection of the laws guaranteed to him by the constitution and laws of the United States.

Sixth. That none of the defendants have been convicted in any criminal prosecution for any of the wrongful acts charged herein.

Seventh. That the plaintiff, prior to and up to the time of his arrest and during all of the time mentioned in said complaint, had conducted himself as a law abiding citizen of the United States and of the State of Colorado.

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of one hundred thousand dollars ($100,000.00) and for costs of this action; that a finding be had that the defendants, and each of them, were guilty of malice
7 in doing the acts complained of herein and in default of payment of any judgment awarded the plaintiff in this action that execution against the body of the defendants and each of them issue from this court and that they be imprisoned according to law.

JOHN H. MURPHY,
Attorney for Plaintiff.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

STATE OF COLORADO, *City and County of Denver, ss:*

Charles H. Moyer, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing entitled cause of action; that he has read the said complaint, and he knows the contents thereof to be true of his own knowledge, except as to those matters and things which he has alleged therein upon information and belief, and as to those matters and things, he believes it to be true.

8 CHARLES H. MOYER.

Subscribed and sworn to before me this 11th day of March, A. D. 1905.

My commission expires Feb. 28, 1907.

[NOTARIAL SEAL.] L. E. KENWORTHY,
Notary Public.

(Endorsed:) No. 4707. In the Circuit Court of the Eighth Judicial District in and for the District of Colorado. Charles H. Moyer, Plaintiff, *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells, Defendants. Complaint. Filed Mar. 11, 1905, Robert Bailey, Clerk. John H. Murphy, Attorney for Plaintiff.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the United States Circuit Court for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
versus
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Complaint Filed in the Clerk's Office this 11th Day of March, A. D. 1905.

The President of the United States of America to the Above-named Defendants, Greeting:

You, and each of you are hereby notified that an action has been brought in said Court, by Charles H. Moyer plaintiff against
9 you as defendants, to recover the sum of one hundred thousand dollars ($100,000) damages sustained by plaintiff by

reason of his being arrested, imprisoned, deprived of his liberty and subjected to hardships, privations, humiliations and disgrace, by the defendants, without legal process and in due course of law; at the town of Telluride, County of San Miguel in said district from March 30th, 1904, to June 15th, 1904. And that in default of payment of any judgment awarded to the plaintiff, that execution issue against the bodies of the defendants and that they be imprisoned, and for costs of suit; as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said Court, within thirty days (exclusive of the day of service) after this summons shall be served on you, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court, at the City and County of Denver, in said district, this 13th day of March, A. D. 1905, and of the Independence of the United States the 129th year.

10 [Seal U. S. Circuit Court.]

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

DENVER, COLORADO, *March 30th, A. D.* 1905.

I hereby certify, that I received the within writ on the 18th day of March, A. D. 1905, and that I have personally served the same upon the said defendants James H. Peabody, Sherman M. Bell and Bulkeley Wells by delivering to James H. Peabody, Sherman M. Bell and Bulkeley Wells and each of them personally, a true copy of the within writ, at the time and place as follows: As to Sherman M. Bell at Denver, City & County of Denver on the 18th day of March, A. D. 1905. As to James H. Peabody, at Denver, City & County of Denver, on the 23rd day of March, A. D. 1905. As to Bulkeley Wells at Denver, City & County of Denver, on the 29th day of March, A. D. 1905.

DEWEY C. BAILEY, *Marshal,*
By EDWIN H. DAVIS,
Deputy Marshal.

(Endorsed:) No. 4707. United States Circuit Court for the District of Colorado. Charles H. Moyer, Plaintiff, *versus* James H. Peabody, *et al.,* Defendant. Summons. Filed, Mar. 30, 1905, Robert Bailey, Clerk. John H. Murphy, Attorney for Plaintiff.

11 UNITED STATES OF AMERICA, *District of Colorado, ss:*

No. 4707.

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Demurrer.

At this day come James H. Peabody and Bulkeley Wells, by S. D. Crump and George P. Steele, their attorneys, and demur to the plaintiff's bill of complaint, and as ground for their demurrer state:

That the bill of complaint herein does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

Wherefore, they pray that they be not required to plead further herein, and that they have judgment to go hence without day, and for their costs.

S. D. CRUMP,
GEO. P. STEELE,
Attorneys for Defendants.

(Endorsed:) No. 4707. Charles H. Moyer, *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells. In the Circuit
12 Court. Demurrer to Complaint by Peabody and Wells. Filed, Apr. 20, 1905, Robert Bailey, Clerk. George P. Steele attorney for Defendants, Suite 450 Equitable Building, Denver, Colorado.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Demurrer.

At this day comes the defendant Sherman M. Bell, by Rice W. Means and Tom Herrington, his attorneys, and demurs to the plaintiff's bill of complaint, and as grounds for this demurrer states:

First. That said complainant does not state facts sufficient to constitute a cause of action against this defendant.

Second. That said complaint does not affirmatively show that this court has jurisdiction of the subject matter of this action within the meaning of Section 1979 of the Revised Statutes of the United States, for the reason that said complaint does not specifically set forth the statute, regulation, custom or usage in the State of Colorado by which the plaintiff has been subjected to *to* the de-
13 privation of any right, privilege or immunity secured to him by the constitution and laws of the United States.

Third. That said complaint does not state facts which involve any federal question to be determined by this court.

Wherefore he prays that he be not required to plead further herein, and that he have judgment to go herein without delay, and for his costs.

Respectfully submitted,

TOM HERRINGTON,
RICE W. MEANS,
Attorneys for Defendant Sherman M. Bell.

STATE OF COLORADO, *City and County of Denver, ss:*

Sherman M. Bell, being first duly sworn, deposes and says that he is one of the defendants in the above entitled cause; that he has been advised by his counsel that the foregoing pleading is well founded in point of law, and he further says that said pleading was interposed in good faith and not for the purposes of delay.

SHERMAN M. BELL.

Subscribed and sworn to before me this 29 day of April A. D. 1905.

LILLIAN GRIFFIN,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires Dec. 5th, 1906.

14 (Endorsed:) No. 4707. In the United States Circuit Court within and for the District of Colorado. Charles H. Moyer, Plaintiff *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells, Defendants. Demurrer to complaint. Filed, Apr. 20, 1905. Robert Bailey, Clerk. Rice W. Means and Tom Herrington, Attorneys for Defendant, Sherman M. Bell.

Seventh Day, May Term, Wednesday, May 10th, A. D. 1905.

Present: The Honorable Moses Hallett, District Judge, and other officers as noted on the second day of May, A. D. 1905.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY ET AL.

Action for Damages.

At this day comes the plaintiff by John H. Murphy, Esquire, his attorney and thereupon, on his motion, and pursuant to a written stipulation thereto herein filed,

It is ordered by the court that the plaintiff may file herein an amended complaint instanter, which is accordingly done.

And thereupon, on motion of plaintiff, it is ordered by the court that the defendants plead to the amended complaint herein within twenty (20) days from this day.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

15 CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Amended Complaint.

Suit at Law.

The plaintiff, Charles H. Moyer, first having obtained leave of court, files this his amended complaint, and for a cause of action against James H. Peabody, Sherman M. Bell and Bulkeley Wells, defendants in the above entitled cause of action, alleges:

First. That the said plaintiff is, and was during all of the time mentioned in this complaint, a citizen of the United States and a citizen and resident of the State of Colorado; that the said defendants also are, and were during all the time mentioned in this complaint, citizens of the United States and citizens and residents of the State of Colorado, but the said plaintiff brings this action in this court against said defendants under the Constitution of the United States and under section 1979 of the Revised Statutes of the United States by reason of the fact, as will more fully appear hereinafter in this complaint, that the defendants, under color of the Constitution of Colorado and of the laws thereof, subjected this plaintiff to the

deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

Second. That at the general election, held in the State of Colorado on the 4th day of November, A. D. 1902, the defendant,
16 James H. Peabody, was elected Governor of the State of Colorado; that he duly took and subscribed the proper oath of office and filed the same in the office of the Secretary of the State of Colorado, and entered upon the discharge of his duties as Governor of the 13th day of January, 1903, for a term of two years ensuing from said date; that thereafter as Governor of said State he appointed the defendant, Sherman M. Bell, as Adjutant General of the National Guard of the State of Colorado, and the defendant, Bulkeley Wells, as Captain of a Company thereof; that on or about the 23d day of March, A. D. 1904, the said defendant, James H. Peabody, as Commander in Chief of the State Militia, and the said Sherman M. Bell, as Adjutant General thereof, directed and caused a portion of the said National Guard of Colorado to assemble in the City of Telluride, San Miguel County, State of Colorado, and said National Guard, while so assembled, was under the direction, orders and control of James H. Peabody as Commander in Chief thereof, Sherman M. Bell as Adjutant General and Bulkeley Wells as captain thereof.

Third. That on or about the 30th day of March, A. D. 1904, the said defendants, acting as officers of the said National Guard of Colorado and as officers of the State of Colorado, gave directions to and caused a squad of men, a part of and composing the National Guard who were at the time under the control and direction of said defendants, to arrest the plaintiff herein and imprison him
17 in a place commonly designated as the City Jail in the Town of Telluride, County of San Miguel, State of Colorado, and in pursuance of said order and direction, the said plaintiff was arrested, confined and kept forcibly and against his will (except during a short period of time during which they took him as a prisoner to other points) from about 8:05 A. M. of said 30th day of March, A. D. 1904, until the hour of about 3:45 P. M. of June 15, A. D. 1904, restraining him, the said plaintiff, with force and arms, of his liberty and subjecting him to hardships, privations, humiliations and disgrace; that the said defendants, as plaintiff is informed and believes, and, therefore, alleges the fact to be, claimed the right to arrest and detain the said plaintiff by virtue of their being officers of the State of Colorado, as aforesaid, and under the laws of Colorado, to-wit, Section 2 of Article IV of the Constitution of Colorado, which is as follows:

"The supreme executive power of the State shall be vested in the governor who shall take care that the laws shall be faithfully executed."

And Section 5 of Article IV of said Constitution, which is as follows:

"The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of

the United States. He shall have power to call out the militia to execute laws, suppress insurrection and repel invasion."

18 That the said defendants claimed other statutes of Colorado gave them also the right to arrest, imprison and detain the plaintiff, as is described in this complaint and under color of said laws did arrest, imprison and detain this plaintiff, as herein set forth. The said plaintiff is unable to set out herein said statutes as he is not able to find them in the statute books or laws of Colorado and said statutes were never pointed out to him by the said defendants, but the defendants claimed, as aforesaid, the laws of Colorado empowered them to act toward him as herein set forth, and, as aforesaid, under color of the laws of Colorado defendants deprived him of his liberty.

Fourth. That after the arrest and detention of the plaintiff by the said defendants, as aforesaid, he made application to the Supreme Court of the State of Colorado, which is the highest court and court of last resort in said State, for a writ of *habeas corpus,* in the application for which writ the prisoner asserted that he was deprived of his liberty contrary to the laws of the State of Colorado and of the laws of the United States; that the said court allowed the writ to issue; that in their return to said writ the resopndents, Peabody, Bell, and Wells, did not claim that the courts of said State of Colorado, or in any part of said State, were overthrown and that a trial could not be had to determine any charge of crime made against this plaintiff; the said Sherman Bell, in his return

19 to said writ and in justification of the arrest and detention of plaintiff, said in substance and effect, that he was the Adjutant General of the National Guard of Colorado and that the Governor of the State of Colorado had given him orders to arrest and detain the said Moyer and not to release him under any circumstances until further orders from the Governor of the State, and he further stated that the said Bulkeley Wells was at the time a subordinate military officer under the direct command of the said Sherman Bell and that the said Bulkeley Wells was acting pursuant to the orders of said Sherman Bell as Adjutant General of the National Guard of the State of Colorado. That also in the return made by the said Sherman Bell to the said writ of *habeas corpus,* he stated:

"The undersigned further causes the court to be informed and advised that the said Governor of the State of Colorado, in the exercise and discharge of his constitutional duties and powers in the premises, has issued orders and instructions to the undersigned, in his official capacity, not to surrender or release the said military custody or charge of the said Moyer."

And the said Peabody certified to and endorsed the correctness of this statement in his return to the writ of habeas corpus, aforesaid, and the said Peabody also stated that he was acting in his official capacity under the laws of Colorado relating to the arrest, detention and imprisonment of the said Moyer.

In further proceedings relating to the said application for

20 a discharge of this plaintiff on *habeas corpus* the said Supreme Court of the State of Colorado refused to admit him

to bail, and it finally rendered a judgment in said cause adjudging and decreeing that the Governor of the State of Colorado and the other said respondents, who are defendants herein, might as officers of the State of Colorado, as aforesaid, under the authority vested in them under the Constitution and the sections thereof herein set forth and statutes of said State hold and detain the said C. H. Moyer until, in their judgment, they saw fit to release him, thus by said decision establishing it to be a law and regulation in Colorado that the plaintiff herein or any citizen may at the will of the Governor and officers of the militia be deprived of life, liberty or property without due process of law and that they may deny any person within the State of Colorado the equal protection of the laws, and that by the acts and decisions of said court this plaintiff, or any other person similarly situated can not obtain in the courts of Colorado any redress for the grievous wrong so inflicted upon him or them by reason of said decision, which is contrary to and annuls the provisions of the Constitution and laws of the United States relative to personal rights.

Fifth. The plaintiff says and alleges that notwithstanding the claim of the defendants to be acting under the laws of Colorado, as aforesaid, and the decision of said Supreme Court, as afore-
21 said, his arrest and imprisonment by them was without probable cause and without legal process or color thereof and not in due course of law; that his arrest and imprisonment, notwithstanding the action of the defendants under the guise and color of the laws of said State of Colorado and the said decision of the Supreme Court was contrary to the Constitution and laws of the United States, and that the course and conduct of the defendants, and each of them, was in wanton and reckless disregard of the rights of the plaintiff and wholly in disregard of the rights and privileges and immunities guaranteed to the plaintiff by the Constitution and laws of the United States.

Sixth. That the plaintiff, prior to and up to the time of his arrest and during all of the time mentioned in said complaint, had conducted himself as a law abiding citizen of the United States and of the State of Colorado; that during all of the time mentioned in said complaint any person having committed a crime or charged with the commission of a crime, the Constitution and laws of Colorado require that he should be informed of said charge in writing under oath or affirmation; that he should have the right to appear in court and defend in person or by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his behalf and a speedy and public trial by an im-
22 partial jury in the district in which the offense was alleged to have been committed, and that pending trial the person charged with crime, except for a capital offense, shall be bailable on furnishing sufficient sureties; that to give any person who it is alleged has violated any law or who it is believed has violated any law of Colorado the privileges and immunities of citizens of the United States, due process of law and the equal protection of the law they should be and must be proceeded against in accordance with the

aforesaid requirements and provisions of the laws of Colorado. That at no time was there any complaint, under oath or affirmation, lodged or filed in any court of competent jurisdiction against this plaintiff, and during all of the time he was prevented from having access to the courts of said state, from the privilege of demanding in any court of competent jurisdiction the nature of the cause of the accusation, from meeting witnesses, if any, against him, face to face, and from having a speedy and public trial by an impartial jury of the county and district in which any alleged offense or supposed offense was alleged to have been committed by him. That during all the time of the arrest, detention and imprisonment the courts of the State were open and in the free and undisturbed administration of justice, except in so far as the defendants prevented said courts from administering judicially the law of the State. The plaintiff is
23 not and was not during any of the time mentioned herein a member of the National Guard of the State of Colorado, or in any way subject to its rules and regulations. That from and during the imprisonment of the said plaintiff he was compelled to stay most all of the time in said City Jail of Telluride and an armed guard or guards were constantly kept near and about him. That the said jail was damp and unwholesome, and by reason thereof the said plaintiff contracted an illness which greatly impaired and shattered his health, from which he still suffers very greatly. And that by reason of said false arrest, imprisonment and detention the said plaintiff suffered great humiliation of mind and mental anguish which also tended to impair and did impair his health, from which impairment of health he still suffers. On account of all which wrongful acts, as aforesaid, of the said defendants, the plaintiff has been damaged in the sum of one hundred thousand dollars ($100,000.00).

Seventh. That the wrongful acts committed by the defendants, as aforesaid, deprived the plaintiff of the privileges and immunities of a citizen of the United States, of his liberty without due process of law and denied to him the equal protection of the laws guaranteed to him by the Constitution and laws of the United States.

Eighth. That none of the defendants have been convicted in any criminal prosecution for any of the wrongful acts charged
24 herein.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of one hundred thousand dollars ($100,000.00) and for costs of this action; that a finding be had that the defendants, and each of them, were guilty of malice in doing the acts complained of herein, and in default of payment of any judgment awarded the plaintiff in this action that execution against the body of the defendants, and each of them, issue from this court and that they be imprisoned according to law.

JOHN H. MURPHY,
Attorney for Plaintiff, 502-3 *Kittredge Bldg.*,
Denver, Colorado.

RICHARDSON & HAWKINS,
Of Counsel.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Verification.

STATE OF COLORADO, *City and County of Denver, ss:*

25 Charles H. Moyer, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing entitled cause of action; that he has read the said amended complaint, and he knows the contents thereof to be true of his own knowledge, except as to those matters and things which he has alleged therein upon information and belief, and as to those matters and things, he believes it to be true.

CHARLES H. MOYER.

Subscribed and sworn to before me this 9 day of May, A. D. 1905. My commission expires Feb. 28th, 1907.

LOUIS E. KENWORTHY,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) No. 4707. In the Circuit Court of the Eighth Judicial District in and for the District of Colorado. Charles H. Moyer, Plaintiff, *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells, Defendants. Amended complaint. Filed May 10, 1905, Charles W. Bishop, Clerk. John H. Murphy, Attorney for Pl't'f. 502-3 Kittredge B. Denver. Richardson & Hawkins, of counsel.

First Day, November Term, Tuesday, November 7th, A. D. 1905.

November Term, A. D. 1905.

Pleas in the Circuit Court of the United States for the District of Colorado at a term thereof begun and held at the United States Court House in the City and County of Denver on the first
26 Tuesday (it being the seventh day) of November, A. D. 1905.

Present: The Honorable John A. Riner, Judge of the District Court of the United States for the District of Wyoming, assigned to the District of Colorado.
Earl M. Cranston, Esquire, District Attorney.
Dewey C. Bailey, Esquire, Marshal.
Charles W. Bishop, Esquire, Clerk.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

Action for Damages.

The motion to dismiss herein having heretofore come on to be heard and having been argued by E. F. Richardson, Esquire, attorney for the plaintiff, and by William R. Ramsey, Esquire, attorney for the defendants and having been taken under advisement and the court having considered the same and being now fully advised in the premises,

It is ordered by the court, for good and sufficient reasons to the court appearing, that said motion be and the same is hereby overruled.

It is further ordered by the court that the defendants may demur or answer herein within ten days from this day.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

27 In the Circuit Court of the Eighth Judicial District in and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Joint and Several Demurrer.

Now come James H. Peabody, Sherman M. Bell, and Bulkeley Wells, the defendants in the above entitled action, and herewith file their joint and several demurrer to the amended complaint in said action, and for grounds and cause of said joint and several demurrer state and show to the court as follows:

First. That the said Circuit Court has no jurisdiction of said action, or the subject-matter thereof.

Second. That the said Circuit Court has no jurisdiction of the subject of the said action, in this, that the original jurisdiction conferred upon the Circuit Courts of the United States by Section 1979 of the Revised Statutes of the United States, does not authorize or empower the Circuit Courts of the United States, or either or any of them, to take cognizance of or hear or determine controversies, suits or actions based upon the alleged facts, or either of them, set forth in said amended complaint.

Third. That the said amended complaint does not state
28 facts sufficient to constitute a cause of action, in this, to-wit:

That it affirmatively appears from the allegations contained in said amended complaint that all and singular, the matters in con-

troversy herein are *res adjudicata*, for that the Supreme Court of the State of Colorado, in a civil suit heretofore begun therein by the plaintiff herein, wherein the defendants herein were parties defendant or respondent thereto, and in which suit the authority and power of the defendants herein, and each of them, to arrest and detain the plaintiff (being the identical arrest and detention complained of herein), was in issue and was heard and determined by said Supreme Court, in which suit said Supreme Court finally adjudicated that the said arrest and detention herein complained of were in all respects lawful and valid, and did not contravene the provisions of the constitution of the State of Colorado, or of the United States; the said Supreme Court then and there having jurisdiction to adjudge and determine whether the arrest and detention complained of was or was not in violation of the constitution or laws of the United States, or either or any of the provisions thereof; and the said Supreme Court having adjudged, all and singular, the matters in controversy herein, in favor of the defendants, the plaintiff is now barred from having or maintaining any suit or action whatsoever in this or any other court, based or founded upon the arrest or detention complained of;
29 all of which matters appear upon the face of said complaint; and the defendants crave oyer of the record in and opinion by said Supreme Court in said suit, and file herewith a duly certified copy thereof for the information of this court.

Fourth. The said amended complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them (this assignment of ground of demurrer being independent of the question of former adjudication, presented by the third ground of demurrer).

Fifth. The said amended complaint is ambiguous and uncertain in the following particulars:

A. That it fails to negative the existence of a state of insurrection in the said County of San Miguel, as found and declared by the defendant, James H. Peabody, as the Governor and Supreme Executive of the State of Colorado, pursuant to the authority conferred upon said supreme executive by the constitution and laws of the State of Colorado.

B. It is wholly uncertain from the averments in said amended complaint whether the plaintiff intends to charge that the defendant, James H. Peabody, as Governor and supreme executive of the State of Colorado, was not possessed of lawful authority to ascertain and determine the existence of a state of insurrection in the said County of San Miguel at and before the time of the arrest and de-
30 tention of the plaintiff, as complained of, and also to ascertain and conclusively determine whether the said plaintiff, in the said county of San Miguel, was one of the insurgents or an aider and abettor of the existing insurrection, and hence necessary to arrest and imprison during the continuance of the military occupation in said insurrectionary county.

C. The said amended complaint is further uncertain and ambiguous in that while it expressly appears from the judgment and opinion of the Supreme Court of the State of Colorado (expressly

mentioned and referred to in said amended complaint and thereby incorporated into and made a part of said pleading), that the defendant, James H. Peabody, as the Governor and supreme executive of the State of Colorado, had in fact ascertained, found and determined, pursuant to the constitution and laws of said State that a state of insurrection did exist (at the time of said arrest and detention), and for some time had existed in the said county of San Miguel, and had called out the militia of the State of Colorado for the purpose of suppressing said insurrection, and had caused and directed the other defendants to arrest and detain the plaintiff, as a necessary step in the course of the suppression of said insurrection (the said arrest and detention being the same complained of herein), it is nevertheless, wholly uncertain whether the plaintiff intends to claim or assert in this action that this court is
31 vested with the power to review the decision and finding of the said Governor and supreme executive, as to the existence of a state of insurrection, in fact, in said county, and also the finding and determination of said Governor and supreme executive as to whether the said arrest and detention of the plaintiff was a necessary or prudential measure in connection with the suppression of said insurrection, or whether the plaintiff intends to charge that regardless of whether the constitution and laws of the State of Colorado vest the said Governor with the executive and political power of finally deciding the existence of said insurrection and the connection of the plaintiff therewith, and the necessity of arresting and detaining him as aforesaid, such power would, all and singular, be in contravention of the provisions of the constitution of the United States.

D. It is wholly uncertain from the averments of said complaint whether the plaintiff intends to claim and assert that the State of Colorado possesses no power under its constitution and statutes to invest the Governor of the State with the political, executive and discretionary authority of conclusively determining the existence of a state of insurrection in a given locality in said State, and with the additional power of arresting and detaining such persons in such insurgent district as in his judgment may seem necessary as a military measure, for the suppression of the insurrection
32 so declared to exist, or whether the plaintiff intends to claim and assert that if the State may lawfully clothe the Governor with such power, nevertheless the manner of exercising such authority may be made a subject of judicial inquiry thereafter in the Circuit Court of the United States, including the district or districts so found and determined to be in a state of insurrection.

And for other good and sufficient reasons.

N. C. MILLER,
Attorney General of the State of Colorado, Attorney for Defendants.

JNO. M. WALDRON,
Special Counsel for Defendants.

(Endorsed:) No. 4707. In the Circuit Court of the United States, within and for the District of Colorado. Charles H. Moyer, Plaintiff, *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells, Defendants. Joint and several demurrer. Filed, Nov. 16, 1905, Charles W. Bishop, Clerk. N. C. Miller, Attorney General, Denver, Colorado, and Jno. M. Waldron, 701 Continental Bldg., Denver, Colorado, Counsel for Defendants.

No. 4707.

In the Circuit Court of the United States within and for the District of Colorado.

CHARLES H. MOYER, Plaintiff,
vs.
33 JAMES H. PEABODY ET AL., Defendants.

Certified Copy of Transcript of Record from the Supreme Court of Colorado.

In re CHARLES H. MOYER.

Filed as part of plaintiff's amended complaint, pursuant to oyer craved in defendants' demurrer thereto.

In the Supreme Court of the State of Colorado.

No. 4828.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

Comes now the above named Charles H. Moyer, and respectfully petitioning this Court for a writ of *habeas corpus*, alleges and states:

First. That your petitioner is a native-born citizen of the United States, and has been for several years last past, and now is, a citizen of the State of Colorado, and a resident of the City and County of Denver (formerly County of Arapahoe) in said State.

Second. That heretofore and on or about the 25th day of March, A. D. 1904, your petitioner was present in person at the City of Ouray, in the County of Ouray and State of Colorado, in the transaction of business connected with his office as President of a labor organization known as The Western Federation of Miners.

Third. That on or about said date a certain organization
34 known as The Citizens' Alliance of the City of Telluride, County of San Miguel and State of Colorado, composed of certain individuals living in said City, engaged in the business of merchandising, banking, gambling and liquor selling, conceived the idea of arresting the body of your petitioner and incarcerating it in the common jail of the said County of San Miguel, and to

that end conspired, confederated and agreed together that one of their number, to-wit: one —— —— should swear out a warrant before a Justice of the Peace in and for the said San Miguel County, who as your petitioner is informed and believes and therefore states, was also a member of the said Citizens' Alliance, charging your petitioner with an alleged criminal offense, under a statute of this state, in this, to-wit, that your petitioner had violated the provisions of an act entitled "An Act to Prevent The Desecration of the Flag of The United States and of the Flag of the State," approved on the 28th day of March, 1901, and found at page 182 of the Session Laws of 1901, by causing to be circulated in the County of San Miguel and State of Colorado, a United States flag, bearing certain words thereon, alleged to be contrary to the form of said statute and against the law of the said State of Colorado.

Fourth. That thereupon the said Justice did issue a warrant, under his hand and seal, for the arrest of your petitioner
35 which said writ was placed in the hands of one J. G. Rutan, the sheriff of the said County of San Miguel, who did cause the arrest and imprisonment of your petitioner at the City of Ouray, County of Ouray and State of Colorado, and did thereafter remove the body of your said petitioner from the said City of Ouray and County of Ouray, to the common jail in the City of Telluride, County of San Miguel, and State of Colorado.

Fifth. That thereafter and on to-wit, the 28th day of March, A. D. 1904, such proceedings were had under the said arrest before the said Justice of the Peace, upon said charge, as that your petitioner waived hearing thereon and was, by the said Justice of the Peace, let to bail in the sum of Five Hundred Dollars, to answer for his appearance at the next term of the District Court to be holden in the said County of San Miguel and State of Colorado, on Tuesday, the 10th day of May, A. D. 1904.

Sixth. That thereafter and on to-wit, the same day, your said petitioner did furnish the bond required by the said Justice, with sureties which were duly and regularly approved, and thereupon your petitioner was allowed to go at large so far as the civil authorities of the said County of San Miguel were concerned.

Seventh. That heretofore, and on, to-wit, the 23rd day of March, A. D. 1904, James H. Peabody, then and now the Governor
36 of the State of Colorado, made and issued the following proclamation and executive order, to-wit:

STATE OF COLORADO,
EXECUTIVE CHAMBER,
DENVER.

Proclamation.

Whereas, There exists in San Miguel County, Colorado, a certain class of individuals who are acting in conjunction with a certain large number of persons outside of said County, who are fully armed and acting together; and

Whereas, Open and public threats have been made to resist the laws of this State and offer violence to citizens and property located in San Miguel County; and

Whereas, at divers and sundry other times various crimes have been committed in San Miguel County, by, or with the aid and under the direction of said vicious and lawless persons; and

Whereas, Threats, intimidations and violence are threatened and — believe will be resorted to by said lawless class of individuals; and

Whereas, It is stated to me by the Sheriff of said San Miguel County, that these forces within and without said County are about to join forces within said San Miguel County, for the purpose of destroying property and inflicting personal injuries upon the citizens of said County; and

Whereas, By reason of such lawlessness and disturbances and threatened acts of violence, the civil authorities are unable to cope with the situation.

Now, therefore, I, James H. Peabody, Governor and Commander-in-Chief of the Military Forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said County of San Miguel, in the State of Colorado, to be in a state of insurrection and rebellion.

In testimony whereof, I have hereunto set my hand and
37 caused the Great Seal of State to be affixed, at Denver, the State Capital, this twenty-third day of March, A. D. one thousand nine hundred and four.

(Signed) JAMES H. PEABODY.

By the Governor, Attest:
JAMES COWIE,
Secretary of State.
TIMOTHY O'CONNOR, *Deputy.*

STATE OF COLORADO,
EXECUTIVE CHAMBER,
DENVER.

Executive Order.

Ordered:

It having been made to appear to me by the Mayor of Telluride, by five of the City Aldermen, the City Attorney, the Chairman of the Board of County Commissioners, of San Miguel County, and the sheriff thereof, together with numerous other officials and citizens of Telluride and San Miguel County, that there is within the County of San Miguel a large number of persons working in sympathy and harmony with a large number of persons outside of said county, who are arming themselves and threatening to join forces with said San Miguel County for the purpose of destroying property and inflicting personal injuries upon the citizens of said San Miguel County, and that said bodies of men are acting together, and by force attempting to commit felonies within said

county, and to offer violence to persons and property and are threatening to break and resist the laws of this State, and that the civil authorities within said town and county are unable to suppress the same or to provide safety to the persons or property of the residents of said San Miguel County, and that the conditions require immediate action to avoid the breaking out of the riot within a few hours, and that the Sheriff of said San Miguel County has notified me that he is unable to preserve and maintain order and secure obedience to the laws of this State, and to protect the lives and property of the citizens of said county:

38 I therefore direct you, in pursuance of the power and authority vested in me by the Constitution and laws of this state to forthwith order out such troops as in your judgment may be necessary, and to report forthwith to the Sheriff of said San Miguel County, Colorado, and that you use such means as you may deem right and proper, acting in conjunction with, or independently of the civil authorities of said San Miguel County, as in your judgment and discretion conditions demand, to restore peace and good order in said community, and to enforce obedience to the Constitution and laws of this state.

Given under my hand and the Executive Seal this twenty-third day of March, A. D. 1904.

(Signed) JAMES H. PEABODY,
Governor and Commander-in-Chief.

To Sherman M. Bell, Adjutant General of the State of Colorado.

Eighth. That shortly thereafter and prior to the said 28th day of March, A. D. 1904, the Adjutant General of the State of Colorado, to-wit, one Sherman Bell, did proceed to the said City of Telluride and County of San Miguel, under said proclamation and order, with about three hundred men, consisting of officers and soldiers constituting a portion of the National Guard of the State of Colorado, and on and prior to the said 28th day of March, A. D. 1904, the said Bell, with the said members of the National Guard, officers and men as aforesaid, proceeded to occupy the City of Telluride, in the County of San Miguel and State of Colorado.

Ninth. That on the 29th day of March, A. D. 1904, the said Sherman Bell, together with one Buckley Wells, did proceed to arrest and take and hold in custody the body of your petitioner,

39 and ever since said time have retained the said body in custody and in prison.

Tenth. That the said arrest, the said taking into custody and the said imprisonment of your petitioner was without any process or warrant of law at all, none such ever having been issued and was an arbitrary and unwarranted and illegal interference with the liberty of your petitioner.

Eleventh. That the alleged cause of the said detention, arrest and imprisonment of your petitioner, as your petitioner is informed and believes, is upon the pretended ground of some pretended military necessity, the cause of which is not stated, but the real cause of the detention, as your petitioner verily believes

is in pursuance of the unlawful conspiracy, combination, confederation and agreement of the members of the so-called Citizens' Alliance of the said City of Telluride, in which the said Buckley Wells is an active and conspicuous member, and to which the said Sherman Bell has given his aid, countenance and support, and the aid, countenance and support of the military organization of the State of Colorado.

Twelfth. That, on to-wit, the said 29th day of March, A. D. 1904, the judge of the district court of the Seventh Judicial District, sitting at chambers in the City of Grand Junction, County
40 of Mesa and State of Colorado, was petitioned for a writ of *habeas corpus* in behalf of your petitioner, which said petition was in words and figures as follows, to-wit:

STATE OF COLORADO, *County of Ouray, ss:*

In the District Court.

Petition for a Writ of Habeas Corpus.

In re CHARLES H. MOYER, Petitioner.

Comes now the above named petitioner, Charles H. Moyer, makes application to the above entitled court and to the Judge thereof for the issuance of a writ of *habeas corpus* in his behalf, and for the grounds of his petition alleges and states:

1. That he is unlawfully detained and restrained of his liberty by Sherman Bell and Buckley Wells at the City of Telluride in the County of San Miguel and State of Colorado.

2. That he has not been committed or detained by them or either of them for any criminal or supposed criminal matter.

3. That he is confined and restrained of his liberty by them under the alleged pretense and under color of what they are pleased to term military authority.

4. That the illegality of such imprisonment consists in such detention without any warrant or any complaint, either made or filed against the petitioner by them or either of them, or by any one else.

5. That the said imprisonment, confinement and restraint is not by virtue of any judicial writ or process or order, or any other writ, process or order whatever.

Wherefore, he prays that a writ of *habeas corpus* in his behalf may issue herein, returnable at the earliest possible day, at such place as the court or the Judge thereof may designate.

That upon such return a hearing may be had and held as by the statute in such case made and required.

That upon such hearing he be discharged from the custody of the said Bell and Wells.

41

E. F. RICHARDSON,
JOHN H. MURPHY,
Attorneys for Petitioner.

STATE OF COLORADO, *County of Mesa, ss:*

John H. Murphy, being first duly sworn, doth depose and say that he is one of the attorneys for the above named applicant and petitioner; that on behalf of said applicant and petitioner he makes this affidavit; that he is acquainted with the matters and things set forth in the foregoing petition, and that the same are true as therein stated. And further affiant saith not.

(Signed) JOHN H. MURPHY.

Subscribed and sworn to before me, this 30th day of March, 1904.

(Signed) THERON STEVENS, *Judge.*

Thirteenth. That, upon the filing of the said petition, the said Judge did issue an order, which is in the words and figures as follows, to-wit:

The above petition having been presented to me at Chambers in the City of Grand Junction, County of Mesa and State of Colorado, and it appearing to be a proper petition for a writ of *habeas corpus,* let the writ issue as requested, returnable on the 11th day of April, A. D. 1904, before me at Chambers in the Town of Ouray, at the hour of nine o'clock a. m. That the amount to be tendered for the bringing of the said prisoner is hereby fixed at the sum of twelve dollars, which shall be tendered at the time of the service of the writ, and security shall be filed with the clerk to cover any amount required necessary for the return of the prisoner if a return shall be awarded.

Dated at Grand Junction, Colorado, this 30th day of March, A. D. 1904.

THERON STEVENS, *Judge.*

42 Fourteenth. That thereafter, in behalf of your petitioner, there was duly filed with the clerk of the District Court of Ouray County, surety, duly approved as in said order provided and thereupon and on or about to-wit, the first day of April, A. D. 1904, the said clerk of the said District Court in and for the said County of Ouray, did issue a writ of *habeas corpus* in strict conformity with the statute of the state of Colorado in such case made and provided.

Fifteenth. That thereafter and on Monday, the 4th day of April, A. D. 1904, the said writ of *habeas corpus,* duly and regularly endorsed with the words "By the *Habeas Corpus* Act," was regularly and duly served upon the said Sherman Bell and the said Buckley Wells, at the said City of Telluride, County of San Miguel and State of Colorado, requiring them and each of them to produce the body of your petitioner at the court room in the court house in the City of Ouray, County of Ouray, and State of Colorado, at the hour of nine o'clock a. m. on the 11th day of April A. D. 1904.

Sixteenth. That thereafter and on, to-wit, the 11th day of April, A. D. 1904, such proceedings were had and done before the said judge of the said District Court sitting in and for the said county

of Ouray, as that the following order was made and entered in the said proceeding, to-wit:

43 STATE OF COLORADO, *County of Ouray, ss:*

In the District Court.

In re CHARLES H. MOYER.

Order.

Now on this eleventh day of April, A. D. 1904, the above cause coming on further to be heard upon the return day of the writ of *habeas corpus,* heretofore issued herein, and it appearing from the return of J. C. Rutan, Sheriff of San Miguel County that the said writ was duly served upon the persons therein named, to-wit: Sherman Bell and Buckley Wells at and within the City of Telluride in said County of San Miguel, on the 4th day of April, A. D. 1904, by personally leaving with each of them a copy of the said writ, duly endorsed with the words "By the *Habeas Corpus* Act," and tendering to them the amount of money endorsed on the said writ, and ordered to be tendered, to-wit, The sum of twelve dollars and that in all respects the said writ and the said service thereof were duly made in accordance with law and the said Sherman Bell and the said Buckley Wells appearing not, and the said Charles H. Moyer, neither being present nor produced by them or either of them, nor any of them.

Now, therefore, upon motion of E. F. Richardson, Esquire, appearing in behalf of the said prisoner, the said Charles H. Moyer, it is considered and ordered; that inasmuch as there is no answer to the petition or answer or return to the writ herein, which can be considered by the court or the judge thereof, the said petition shall be and it is hereby taken to be confessed and the facts therein stated be and they are hereby found to be true as therein stated; that the said Charles H. Moyer be and he is hereby ordered to be discharged from the custody of the said Sherman Bell and Buckley Wells; that they and each of them to wit the said Sherman Bell and Buckley Wells be deemed to be, and they are hereby adjudged to be guilty of contempt against the court and the judge of the District Court of the Seventh Judicial District of the
44 State of Colorado, who issued the writ herein, for their disobedience thereto in not producing the prisoner Charles H. Moyer as therein commanded, and that an attachment issue, and it is hereby ordered to issue immediately against the said Sherman Bell and Buckley Wells, directing the Sheriff of the County of Ouray to forthwith arrest and commit the said Sherman Bell and Buckley Wells to the common jail of Ouray County, there to remain without bail or mainprise until they or either of them shall obey the said writ, as therein commanded, and that the said Sherman Bell forfeit and pay to the said Charles H. Moyer the sum of five hundred dollars, and that the said Buckley Wells forfeit and

pay to the said Charles H. Moyer the sum of five hundred dollars, and that they and each of them shall pay one half of the costs of this proceeding to be taxed, and let execution issue for such forfeiture and costs.

To all of which the respondents by their attorneys objected and excepted.

THERON STEVENS, *Judge.*

Seventeenth. That thereafter and on to-wit, the said 11th day of April, 1904, the clerk of said court, pursuant to the terms of said order, did issue a warrant of commitment, in words and figures as follows, to-wit:

STATE OF COLORADO, *County of Ouray, ss:*

In the District Court.

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

We command you to forthwith attach the bodies of Sherman Bell and Buckley Wells, and commit them to the common jail of Ouray County there to remain without bail or mainprise, until the further order of the court or the judge thereof or until they or either of them shall obey that certain writ of *habeas corpus* heretofore and on to-wit the 31st day of March, A. D. 1904,
45 issued by the judge of the District Court, sitting in and for the county of Ouray, commanding them and each of them to produce the body of one Charles H. Moyer, before the said judge at the County Court room in the County Court House in the County of Ouray, and which after due service of said writ they have neglected and refused to do in the premises.

Hereof fail not and make due return to the Clerk of the District Court of the execution of this writ.

Witness W. H. Middaugh, Clerk of said Court, and the seal thereof, hereto affixed at my office at Ouray in said County this 11th day of April, A. D. 1904.

[SEAL.] W. H. MIDDAUGH, *Clerk.*

Eighteenth. That thereafter and on, to-wit, the 12th day of April, A. D. 1904, the said warrant of commitment was duly and regularly placed in the hands of the Sheriff of the County of Ouray, in the State of Colorado, for service.

Nineteenth. That thereafter and on, to-wit, the 13th day of April, A. D. 1904, the said Sheriff of the said County of Ouray did proceed to the City of Telluride, County of San Miguel and State of Colorado, where your petitioner was and still is in the custody of the said Sherman Bell and Buckley Wells, pursuant to the said warrant of commitment.

Twentieth. That the said Sherman Bell and the said Buckley Wells did resist the said Sheriff of the said County of Ouray, who thereupon called to his aid and assistance the said J. C. Rutan, the

Sheriff of the said County of San Miguel and State of Colorado.

46 Twenty-first. That, as your petitioner is informed and believes, and therefore states upon such information and belief, the said Sheriff of the said County of Ouray, together with such aid as the said Sheriff of the said County of San Miguel saw fit to render him, were unable to arrest the said Sherman Bell and the said Buckley Wells, for the reason, as your petitioner is informed and believes, that the said Sherman Bell and the said Buckley Wells did call to their aid and assistance the members of the National Guard so as aforesaid in the said City of Telluride, and remaining in the said City at the time of the attempted service of said writ.

Twenty-second. That, with said aid and assistance, as your petitioner is informed and believes, the said Sherman Bell and the said Buckley Wells loudly and boastfully, through the public press and otherwise, threatened the destruction and death of anyone who should interfere or attempt to interfere with them by the service of said writ, and particularly of the said Sheriff of the County of Ouray or of any posse which might be called by him to aid him in the execution of said writ.

Twenty-third. That the said Sheriff of the County of Ouray, as your petitioner is informed and believes and therefore states, being satisfied that any posse which he could summon would be unable to overcome the said National Guard, acting under the said

47 orders of the said Sherman Bell and Buckley Wells, and sanctioned thereto by the repeated pronounciamentoes and fulminations of the Governor of the State of Colorado, to-wit, the said James H. Peabody, deemed it useless, as your petitioner is informed and believes, to further attempt, at the present time, to serve the said writ on the said Bell and the said Wells, and your petitioner has obtained no relief whatsoever under the terms of said warrant and order.

Twenty-fourth. That at the said proceeding before the said Judge of the said District Court as aforesaid, it was regularly and duly determined that your petitioner was entitled to his liberty, and an order was made, hereinbefore recited, directing and commanding the said Bell and the said Wells to discharge your petitioner from their custody, but, notwithstanding the terms of the said order the said Bell and the said Wells did openly, flagrantly, willfully, maliciously and flagitiously insult and disobey the said judge of the said District Court and the said order so made by him as aforesaid.

Twenty-fifth. That the said District Court, and the said Judge thereof, are without any power whatsoever to carry into effect the decrees and the judgments and orders of the said court and the judge thereof, save and except through the regularly elected, duly qualified and acting Sheriff of the said County of Ouray; that the said Sheriff is powerless to execute the order of the court

48 or the judge thereof, in this instance, by calling to his aid a posse for the reason that the force under the control of the said Bell and the said Wells and the said Governor of the State of

Colorado is vastly greater than any force which the said Sheriff could command.

Twenty-sixth. That it would be useless for the said Sheriff of the said County of Ouray and State of Colorado, to call upon the Governor for military aid, for the reason that the Governor has already advised, encouraged, commanded, sanctioned and authorized the said flagrant disobedience to the said writ, and the said Governor, the said Bell and the said Wells are each and every of them claiming that they and each of them are infinitely superior to any district court or any district judge within the State of Colorado, and that they will neither obey nor respect the orders or decrees of said courts, or of the judges thereof, or any of them; that they will determine, in their own way and to their own ends, what course they will pursue, and if it is attempted to be interfered with by the decree of any district court of the order of any judge thereof they will disregard such decree and will, if they deem it necessary, imprison the said judge who made the order and kill the Sheriff or any other person who attempts to enforce it.

Twenty-seventh. That said arrest, detention and imprison-
49 ment of your petitioner was and is an arbitrary and unwarranted interference with the liberty of your petitioner; that your petitioner is not and has not been guilty of any offense, and has violated no law, and is a peaceable, order-loving and law-abiding citizen with immense provocation—at the instance of a hireling press and an unjust*ly* corporation—inflamed sentiment—to be otherwise, and that no indictment, information or complaint is now or ever has been made or returned against your petitioner, upon any criminal charge of any kind, with the exception of the single charge herein stated, for the alleged desecration of the American flag, which said charge has no foundation in fact whatever, but is used simply as a device by the enemies of organized labor, to create public sentiment against your petitioner, to the end that the employers of said labor may destroy your petitioner and the organization of which he is the President.

Twenty-eighth. That, during the period of the unlawful detention, arrest and imprisonment of your petitioner as aforesaid, by the said Bell and Wells, he has been subjected to the most revolting indignities and humiliations. He has been abused and maltreated, all for the purpose of goading your petitioner into some trivial resistance to the said Bell and Wells, and the said members of the
National Guard acting under them, to the end, as your peti-
50 tioner is informed and believes, that some apparently reasonable excuse may be found for slaying him.

Twenty-ninth. Your petitioner further states that the General Assembly of the State of Colorado has never at any time passed any Act suspending the writ of *habeas corpus* or the privileges thereof, nor has the said General Assembly authorized, at any time, the Governor of the State so to do, nor has the Governor of the State of Colorado, with respect to the said County of San Miguel, ever directly or openly made any proclamation attempting to suspend the said writ or the privileges thereof, and your petitioner alleges, as

he is advised, that the said Governor has no power to either suspend said writ or order any disobedience thereof, either by a general order of suspension or by any special order, or otherwise, and the action of the said governor, and of the said Bell and the said Wells, is in open and flagrant violation of the Constitution and statutes of the State of Colorado.

Thirtieth. Your petitioner further alleged that there is — now nor has there been at any time, within the bounds of said county of San Miguel, any rebellion or invasion, of any kind, nor has the public safety at any time demanded that the writ of *habeas corpus* or the privileges thereof, be suspended, either as to your petitioner or any other person or persons; that the district court of said County of San Miguel and the County Court of said County, and the justice courts of said county, have been at all times in this petition
51 mentioned, open and—during the regular terms—in session with the duly elected and qualified judges presiding thereover and said courts are now and have at all times mentioned, been engaged in accordance with the statute, in the regular trial and disposition of cases upon their civil and criminal dockets and the transaction of such other business as should properly come before the said courts, and that, with the exception of the disobedience of the writs herein mentioned, relating to your petitioner the judgments of said courts and all orders made by them and the judges thereof, are being, and at all times have been, respected and obeyed. That there is not now and never has been, in said county of San Miguel, or any part thereof, any insurrection or rebellion. That the said county is now and has been at all times, in a state of peace and not of war. That the only violations of the law which are now taking place in said county are due to the unlawful combinations and conspiracy of the said Citizens' Alliance aided, abetted and encouraged thereto by James H. Peabody and Sherman Bell. That the civil authorities meet and have met with no resistance whatever in the execution of the process of the court, save only the resistence of the military authorities, consisting of the Governor, the so-called Commanding General and the said Wells. That the District Attorney in and for the said County has been at all times and is
52 now willing and ready to file criminal complaints against any party or parties, whenever furnished with the information necessary to the filing of such complaints, and that the county and district courts of said county are impartial in their administration of the law, and that the public safety does not demand the suspension of the writ of *habeas corpus* or the privileges thereof, as to your petitioner or anybody else, and that no proclamation or proclamations have been made by the said Governor as to the said County, covering the period herein mentioned, other than those herein set forth.

Thirty-first. That the so-called Commanding General, to-wit, the said Sherman Bell, did authorize the following fulmination, as your petitioner is informed and believes, on or about December 5th, 1903, with characteristic grammer, and under which he now requires, as your petitioner is informed and believes the officers and

militia to act in the County of San Miguel and State of Colorado except insofar as he himself shall otherwise, from time to time, order:

Instruction for the Government of Armies and Troops in the Field, Martial Law, Military Jurisdiction, Military Necessity, Retaliation:

The County of Teller, in consequence of the occupation of the militia, is subject to the supreme military authority and control, when necessity requires and the occasion demands and it becomes necessary to suspend in part or its entirety its suspension by
53 the occup-ing military authority of the criminal and civil law and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution or dictation.

The militia may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authorities.

Military Orders Supreme.

As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor and humanity; virtues ador-ing a soldier even more than other men.

To preserve law and order is paramount to all other considerations. All civil and penal law shall continue to take its usual course, unless interrupted or entirely stopped by order of occupying military power.

Martial law extends to both property and person. Whenever possible martial law is carried out in cases of individual offenders by military court, under military jurisdiction, which is two-fold.

Military offences must be tried under and punished in accordance with the rules and articles of war governing the armies of the United States; and incidentally the National Guard of the several states and territories, and the District of Columbia, under the Dick Bill.

May Destroy Property and Life.

Military necessity admits of all direct destruction of life and limb of armed enemies, and other persons whose destruction is incidentally unavoidable. Military necessity does not admit of cruelty. It does not admit of the use of poison in any way. It admits of deception, but disclaims acts of perfidy. It is not carried on by arms alone.
54 It is a law requisite to civilized existence that people live in political continuous society, forming organized units or countries, whose constituents bear, enjoy and suffer, advance

and retrograde together, in peace and in war, secretly and otherwise, organized in open defiance against the laws of the land; and men who take up arms in this respect are responsible to one another and to God.

Peace and prosperity is the normal condition of all states and countries and the more vigorously these conditions are maintained the better it is for humanity. Public and private property of a country, protection of persons, and especially of women and of religion.

Punishable by Death.

A Spy—A spy is punishable by death, whether or not he succeeds in obtaining the information, or is in the act of conveying same.

The military law, like the criminal law regarding other offences, makes no difference on account of sex.

Assassination—The law abhors such outrages as assassination. The sternest retaliation should follow in consequence of a murder committed. Civilized nations look with horror upon offers of reward for the assassination of human beings and the dynamiting of property and consider them as relapses into barbarism.

Insurrection—Insurrection is the rising of people against their government or a portion of it, or against an officer or officers of the government. It may be confined to mere armed resistance or it may have greater ends in view.

Treason—Armed or unarmed resistance by citizens of the United States against the lawful movements of the militia, is treason and the punishment is death.

Subject to Military Service.

Every able bodied male citizen of Colorado, and those who have declared their intention to become citizens of the United States, residing therein, between the ages of eighteen and forty-five years, except persons exempt by law, are subject to military duty
55 and are likewise subject to military enrollment and to pay military poll tax. The adjutant general is empowered with the enforcement and collection of this tax of $1.00 from each person, and the failure or refusal to pay same is punishable by both fine and otherwise.

Every law-abiding citizen in the county of Teller and state of Colorado, if he, she, they or them are engaged in any legitimate business, no matter what their vocation in life, regardless of their union or non-union affiliation and creed, shall first obey the laws of the land, those of Colorado, and the United States of America included; and no one shall be interfered with nor in any wise molested at any time during the day of night, under penalty of military rule, discipline and protection.

I trust that mining and all business in the Cripple Creek district shall continue to improve and prosper and that peace, prosperity and happiness shall continue in the greatest gold mining camp in

all the world as it should and shall henceforth forever be; and that it shall continue to receive the best compensation, both in hours and wages, in the entire country.

(Signed) SHERMAN M. BELL,
Brigadier General, Adjutant General, State of Colorado.

Camp Goldfield, December 5, 1903.

Thirty-second. That the arrest and imprisonment of your petitioner, and the said attempt to suspend the writ of *habeas corpus* as to him, as petitioner is advised, in addition to being a violation of the rights guaranteed to your petitioner by the Constitution of the state of Colorado, is in violation of, and contrary to the fourteenth amendment to the Constitution of the United States,
56 which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

That the actions aforesaid, of the said governor and the military commander under him, are, as your petitioner is advised, also in violation of the fourth amendment of the Constitution of the United States, providing that the right of the people to be secure in their persons, against unreasonable seizures, shall not be violated, and that no warrant shall issue but upon probable cause, describing the person to be seized; and also in violation of the fifth amendment of the Constitution of the United States, providing that no person shall be deprived of his liberty without due process of law; and also in violation of the sixth amendment to the Constitution of the United States, providing that one accused of crime shall be entitled to a speedy trial by jury; and to be informed of the nature and cause of the accusation against him.

Thirty-third. That the said Bell and the said Wells, in command of the said militia, have refused to file or cause to be filed any criminal charge against your petitioner and have refused to in-
57 form your petitioner of any charge made against him, and your petitioner is being held simply as an arbitrary, wicked, unlawful and malicious act upon the part of the said Bell and the said Wells, aided and abetted by the Governor of the State of Colorado, without your petitioner having ever been guilty, in any way, of any crime or act of lawlessness and without his ever having done anything of any kind, to interfere with or obstruct the actions of the said militia.

Thirty-fourth. That, notwithstanding the said Governor and the said Bell and the said Wells has defied and have openly announced that they will continue to defy and trample upon the order and judgment of the said District Court of Ouray County, and the judge thereof, and that they will by force of arms and by death, slaughter and bloodshed, prevent your petitioner's release under the said order, nevertheless, the Attorney General, speaking as the adviser of the

said Governor, at least as your petitioner is informed and believes, stated that if this court will take jurisdiction of the case and determine whether or not your petitioner shall be released under this writ, they will obey the judgment of this court and will be guided and controlled by its opinion as to the law in this case and in all cases of a similar character.

Thirty-fifth. That, so far as your petitioner is informed and believes, and so far as he can gain information upon *upon* that subject, there has never been any declaration by the said governor,
58 or the said Bell or the said Wells, that they will defy the order in this case or in any case which this court may see fit to make; that their declarations in that behalf have so far been limited to the courts of this state which are inferior to this court, and that unless this court does take jurisdiction of this writ, your petitioner is without any manner of remedy whatsoever which the courts are capable of enforcing.

Thirty-sixth. That it is of the greatest necessity that this court should take jurisdiction and speedily determine the questions involved in it, and that said questions are of the greatest public importance. That if this court should decline to settle the questions involved herein, the District Court of Ouray County must of necessity call upon the Sheriff of Ouray County to enforce an order releasing your petitioner. That the said court and sheriff must, to enforce said order, summon and arm the citizens of said county in great numbers. That the said military commanders will resist said attempt to liberate your petitioner with force of arms, and a conflict will result between said two contending forces, involving violence and bloodshed, all of which will be obviated by this court taking and exercising jurisdiction in this case.

Wherefore, your petitioner prays that a writ of *habeas corpus* shall issue herein, directed to the said Sherman Bell and Buckley
59 Wells, directing them to produce the body of your petitioner before this court at a time and place to be fixed by the court, and that they make return at said time to this court, showing the cause if any they have, for such detention and imprisonment, and that your petitioner be released from said illegal confinement, and that your petitioner have such other and further process, orders and relief as will protect him in his constitutional right of liberty.

RICHARDSON & HAWKINS,
Attorneys for and on Behalf of the Petitioner, Charles H. Moyer.

STATE OF COLORADO, *City and County of Denver, ss:*

Edmund F. Richardson, being first duly sworn, doth depose and say; that he is one of the attorneys for the petitioner in the above entitled application for a writ of *habeas corpus* herein, and is authorized by the petitioner to verify this petition; that the said petitioner himself cannot be reached nor gotten to, so as to verify this petition; that he is absent from and without the City and County of Denver, and is, as this affiant is informed and verily believes, neither allowed to see his mail or telegrams, to use the telephone, nor

to hold any communication whatsoever either with his coun-
60 sel, or with any other person save and except those who are obnoxious to him and who are engaged in persecuting and maltreating him. Hence the reasons why this affiant verifies this petition. That he has heard read the foregoing petition and knows the contents thereof, and that he verily believes the matters and things therein stated are true as therein stated.

And further your affiant saith not.

EDMUND F. RICHARDSON.

Subscribed and sworn to before me, this 15th day of April, A. D. 1904.

My commission expires March 6, 1907.

[SEAL.] JOSEPHINE L. TAYLOR,
Notary Public.

(Endorsed:) 4828. In the Supreme Court. *In re* Charles H. Moyer. Petition for original writ of *habeas corpus*. Filed in Supreme Court Apr. 15, 1904. Horace G. Clark, Clerk. Richardson and Hawkins, Attorneys for petitioner.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus*.

Writ of Habeas Corpus.

Upon this the 15th day of April, A. D. 1904, comes the petitioner by his attorneys, Richardson and Hawkins, Esquires, and also come the respondents, Sherman Bell and Bulkley Wells, by the
61 Attorney General, Nathan C. Miller, Esquire, and John M. Waldron Esquire, and thereupon the petition for a writ of *habeas corpus* of Charles H. Moyer being presented to the court,

It is ordered by the court that a writ of *habeas corpus* issue out of and under the seal of this court, directed to Sherman Bell and Bulkley Wells as aforesaid to have the body of the said Charles H. Moyer before this court on Thursday, April 21st, instant at the hour of two o'clock p. m. of said day then and there to do and receive what shall be considered concerning the said prisoner, Charles H. Moyer, together with the time and cause of his detention.

It is further ordered by the court that said petitioner defray the necessary traveling expenses of said respondents in couplying with the order of this court herein.

In the Supreme Court of the State of Colorado.

No. —.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

The people of the State of Colorado to Sherman Bell and Buckley Wells, Greeting:

We command you and each of you that you have the body of one Charles H. Moyer, by you imprisoned and detained as it is
62 averred, together with the time and cause of such imprisonment and detention, by whatsoever name the said Charles H. Moyer shall be called or charged, before the Supreme Court of the State of Colorado, at the Court Room thereof, in the State Capitol Building, in the City and County of Denver, on Thursday, the 21st day of April, 1904, at two o'clock p. m. of that day, to do and receive what shall then and there be considered concerning the said Charles H. Moyer.

Witness the Honorable William H. Gabbert, Chief Justice of the said Supreme Court, at the Court Room thereof, in the City and County aforesaid, on this, the 15th day of April, A. D. 1904.

Attest my hand and the seal of said Court, the day and year last above written.

[SEAL.] H. G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JOHN B. CROOKE, *Deputy.*

STATE OF COLORADO, *County of San Miguel, ss:*

I, J. C. Rutan, Sheriff of San Miguel County, Colorado, do hereby certify that I have duly served the within writ of *Habeas Corpus* on the 16th day of April, A. D. 1904, by personally leaving a true copy of the same upon the desk of Sherman Bell, in his
63 presence, and in the presence of Bulkeley Wells, in the office of Sherman Bell, in the City of Telluride, County of San Miguel, and State of Colorado, at the same time tendering and offering to said Sherman Bell, in the presence of said Bulkeley Wells, the sum of $45.00, lawful money of the United States of America, and by also on said 16th day of April, A. D. 1904, personally leaving a true copy of said writ upon the desk of Bulkeley Wells, in his presence, in his office in said City of Telluride County of San Miguel, and State of Colorado, at the same time tendering and offering to said Bulkeley Wells said sum of $45.00, lawful money of the United States of America, And I do further certify that each said Sherman Bell and Bulkeley Wells refused to receive a copy of said writ in their hands, and each refused to accept said sum of $45.00 lawful money of the United States of America, by me tendered and offered to them as aforesaid, and each said Sher-

man Bell and Bulkeley Wells stated that he refused to accept service of said paper upon him, and each said Sherman Bell and Bulkeley Wells stated to me that he was an officer in the National Guard of the State of Colorado, and was at that time stationed at and attending to active military duties as members of said National Guard of the State of Colorado, in said County of San Miguel, under orders of the Honorable James H. Peabody, Governor of the State
64 of Colorado. I do further certify that said Bulkeley Wells served upon me a written notice, statement or order, dated Telluride, Colo., April 16th, A. D. 1904, and signed by Sherman M. Bell, Brigadier General, Adjutant General, State of Colorado, Commanding Troops, Telluride, San Miguel County, Military District (a copy of which notice, statement or order is hereto attached and made a part of this return.)

Dated Telluride, San Miguel County, Colorado, this 16th day of April, A. D. 1904.

J. C. RUTAN,
Sheriff of San Miguel County, Colorado.

Headquarters.

Telluride, San Miguel County, Military District.

TELLURIDE, COLO., *April 16th, A. D.* 1904.

General Orders.

Captain Bulkeley Wells, Commanding Troop "A" First Squadron Cavalry, National Guard of Colorado, Commanding Camp Telluride, Telluride, San Miguel County Military District, State of Colorado, under General and Special Orders, also Proclamation from Adjutant General's Office, State Capital, Denver, Colorado; also verbal orders and instructions issued or given orally or otherwise from
65 His Excellency, Honorable James H. Peabody, Governor and Commander-in-Chief, National Guard of Colorado, or Sherman M. Bell, Brigadier General, Adjutant General, State of Colorado, Commanding Troops Telluride, San Miguel County, Colorado, Military District, either by General or Special Orders, Field, Verbal, or other orders and instructions given, you will, upon receipt of this order, assume Command of Troops in the field in the said San Miguel County, Colorado, Military District, until further orders from the Governor and Commander-in-Chief, or Sherman M. Bell, Brigadier General, Adjutant General, State of Colorado.

II. You will hold and detain all military prisoners in the hands of the Military in this District, and will under no circumstances or conditions release from custody, deliver or remove from Camp Telluride, one military prisoner, Charles H. Moyer, President of the Western Federation of Miners, now under arrest and detention, and being so held under the will and judgment of the Military Commander, as a Military necessity, and for the preservation of law and order, that peace and quiet may prevail in this community

and State, and that rebellion and insurrection is at an end in this County and State, until further orders from His Excellency, Honorable James H. Peabody, Governor and Commander-in-Chief of the Military forces of the State of Colorado, or from Sherman M. Bell, Brigadier General, Adjutant General, State of Colorado,
66 either by Executive, General, Special or Field Orders or instructions.

III. You will not permit the service upon you of any civil process of arrest or other papers issued from the civil courts of the state, of any character, kind or nature whatsoever, under exemption by law, until further orders and directions from the Governor and Commander-in-Chief or myself.

IV. You will use your best judgment and discretion in the disposition and handling of all local matters as the Commanding Officer of the San Miguel County, Telluride, Colorado Military District, and all officers and enlisted men on duty in said Military District, and including United States Government and State property, shall be in and at your command and in your hands for all military operations, deemed necessary at your will and judgment, to the end that the peace and dignity of this State is fully maintained and her power to suppress lawlessness, riot, intimidation, threats, rebellion, insurrention, and treason is fully asserted.

SHERMAN M. BELL,
Brigadier General, Adjutant General, State of Colorado, Commanding Troops, Telluride, San Miguel County, Military District.

(Endorsed:) 4828. In the Supreme Court. *In re* Charles
67 H. Moyer. Writ of *Habeas Corpus*. The sum of $45.00 shall be tendered at the time of the service of this writ, to the persons therein named, to cover the expense of bringing the said prisoner as herein commanded. "By the *Habeas Corpus* Act." Filed in Supreme Court. Apr. 19, 1904. Horace G. Clark, Clerk.

In the Supreme Court of the State of Colorado.

No. —.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

Motion to Quash and Dismiss Proceedings on Jurisdictional Grounds.

Now come the respondents to the writ of *habeas corpus* in the above entitled proceeding, to-wit, Sherman M. Bell and Buckley Wells, and file herewith their return to the said writ, showing and disclosing thereby that the said petitioner, Charles H. Moyer, is lawfully held and restrained of his liberty by them under and pursuant to the express command of the Governor and Commander-in-Chief of the Military Forces of the State of Colorado, as a military

necessity in the course of the suppression of an existing state of
insurrection and rebellion in the county of San Miguel in
68 the State of Colorado, and that this Honorable Court ought
not to exercise any further jurisdiction in the premises and
is not lawfully vested with jurisdiction to make or render any
further order whatsoever in said proceedings except to dismiss
and quash said writ, from the statement of facts recited and set
forth in said petition, and that the production of the body of the
said Charles H. Moyer, before this Honorable Court on this, the
return day of said writ is not by way of recognition of the juris-
diction of this court to order the release of the said petitioner
Charles H. Moyer, but solely as an act of courtesy on the part of
the Chief Executive of the State and Commander-in-Chief of its
Military Forces, and out of respect to this Honorable Court, to
conform to the mandate of said writ to the extent only of duly
advising the court of the cause of the detention of the said peti-
tioner, Charles H. Moyer.

Wherefore, The respondents now and here, respectfully chal-
lenge the power of jurisdiction of the court to make any other or
further order whatsoever touching the custody or further detention
of said petitioner, Charles H. Moyer, and for the reasons aforesaid
now move this Honorable Court to quash and dismiss said writ and
to enter a final order declining to assume or exercise any further
jurisdiction in the premises, whatsoever.

Respectfully submitted,

N. C. MILLER,
69 *Att'y Gen'l of the State of Colorado,*
Counsel for Respondents.

JNO. M. WALDRON,
Special Counsel.

(Endorsed:) No. 4828. In the Supreme Court, State of Colo-
rado. *In re* Charles H. Moyer, Petition for Original Writ of
Habeas Corpus. Motion to quash and dismiss Proceedings on Juris-
dictional Grounds. N. C. Miller, Atty. Genl. State of Colorado
Appearing for respondents. Jno. M. Waldron, Special Counsel
Filed in Supreme Court Apr. 21, 1904, Horace G. Clark, Clerk.

In the Supreme Court of the State of Colorado.

No. —.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

To the Supreme Court of the State of Colorado, and the Judges
thereof:

The undersigned, Sherman M. Bell, Brigadier General and Adju-
tant General of the State of Colorado, to whom the within writ of
habeas corpus is addressed, respectfully protests that this Honorable

Court ought not to take or exercise further jurisdiction in the matter of said writ, except to dismiss and quash the same, and that
70 it is not lawfully clothed with jurisdiction to order the discharge or release of the said petitioner, Charles H. Moyer, upon the grounds and for the reasons following, to-wit:

That prior to, and on, the 23rd day of March, A. D. 1904 a state of insurrection and rebellion against the government, constitution and laws of the State of Colorado existed and exists in the County of San Miguel, in the State of Colorado, as evidenced by the proclamation and executive order in that behalf, and the facts and conditions therein set forth, duly issued by the Honorable James H. Peabody, then and now, the lawfully elected Governor of the State of Colorado, which said proclamation and executive order is set forth at length in the petition of the said Charles H. Moyer, now on file in said Court, as the basis of the issuance of the writ of *habeas corpus* aforesaid, a certified copy of which is hereto attached and made part hereof and marked "Exhibit A;" which said proclamation and order has been, ever since the issuance thereof, and now is, in full force, effect and operation, and by the Chief Executive of the said State of Colorado, the said County of San Miguel, during said time has been and is now treated, deemed and held to be in a state of rebellion and insurrection as aforesaid, by virtue of the fact that said state of insurrection and rebellion has not been, as yet, effectually suppressed.

That the said Governor, immediately after the issuance of said proclamation and executive order as aforesaid, did issue and
71 direct to the undersigned, as Adjutant General of the State of Colorado, the further executive order set forth in said petition, commanding the undersigned, as Adjutant General, by virtue of the power and authority vested in him by the constitution of the State of Colorado, to order out such troops, constituting a part of the National Guard of militia of said State, as in the judgment of the undersigned might be necessary, and forthwith proceed to the said County of San Miguel, and either in conjunction with or independent of the civil authorities, of said county, to use such means as in the judgment of the undersigned, the existing conditions in said County of San Miguel demanded for the restoration of peace and good order in said community and the effectual suppression of said existing state of insurrection and rebellion, a copy of which is hereto attached, marked "Exhibit B" and is to be read as part of this return.

That in pursuance of said executive order the undersigned being then and now the Adjutant General of said State, did promptly thereafter proceed to the said county of San Miguel, accompanied by and in charge and command of such members of the said National Guard—officers and men—as in his judgment was requisite to carry out the objects and purposes of said executive order, and the suppression of said state of insurrection and rebellion and the restoration of public peace and tranquility in said county; and ever
72 since said time the said National Guard, so under the command of the undersigned as aforesaid, have been and now are actively engaged in and throughout the said county of San Miguel

in the performance of the duties aforementioned; acting, in that behalf, independently of the civil authorities of said county of San Miguel, for the reason that said authorities were found by the said Governor and the undersigned to be wholly powerless to render any aid whatsoever in the suppression of said existing state of insurrection and rebellion as aforesaid.

That in pursuance of the duties aforementioned, and after the arrival of the said National Guard, under the command of the undersigned, in the said county of San Miguel, the undersigned, in his said official capacity, vested with the powers and charged with the duties aforementioned, had good reason to believe and did and does in good faith believe, and upon due inquiry in the premises became personally and officially, fully satisfied and convinced that the said petitioner, Charles H. Moyer, had been and, if discharged from arrest, would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion recited and set forth in said executive order, and was and is, a prominent leader of the bands of lawless men, engaged in the acts of insurrection and crimes mentioned in said proclamation and
73 orders, in said County of San Miguel, and that in order to accomplish the suppression of said state of insurrection and rebellion it was and is, in the judgment of said Governor and the undersigned, absolutely necessary to arrest, detain and for some time to come to restrain the body of the said Charles H. Moyer by the said National Guard of the said State of Colorado, in the course of an absolutely necessary step in the matter of suppressing said state of insurrection and rebellion.

That animated solely by a desire to properly discharge the duties and authority so vested in the undersigned, and in good faith and being thoroughly convinced and satisfied that such action was absolutely necessary for the suppression of said insurrection, the undersigned, by virtue of the power and authority and in the course of the discharge of the duties aforementioned, did cause the arrest, apprehension and detention of the body of the said petitioner, Charles H. Moyer, in the said County of San Miguel, on, to-wit, the 29th day of March, A. D. 1904, and does now restrain, detain and imprison the said Charles H. Moyer for the reasons, upon the grounds, and by virtue of the power and authority so conferred and in the discharge of the duties so enjoined upon the undersigned.

That it is the purpose and intention of the undersigned, in his said official capacity, to release and discharge the person of
74 the said Charles H. Moyer, from military arrest as aforesaid as soon as the same can be safely done with reference to the suppression of the existing state of insurrection and rebellion, and then to surrender him to the civil authorities of said county to be dealt with in the ordinary course of justice after said insurrection is suppressed.

The undersigned does further respectfully inform and advise this Honorable Court that the exigencies of the military situation of said county of San Miguel, in the course of suppression of said insurrection and rebellion, imperatively require the further detention of the person of said Charles H. Moyer, in order to prevent him

from lending aid, comfort, direction, instructions and commands to the said lawless persons in the further prosecution of the acts constituting a state of rebellion and insurrection aforementioned and that the end of public justice, the restoration of public tranquility and the suppression of the state of insurrection and rebellion as aforesaid, require that the present and reasonable further detention of the person of said Charles H. Moyer shall in no wise be interfered with by the writ of *habeas corpus*, or other judicial writ whatsoever.

That the uninterrupted exercise of the military force of the State in the said County of San Miguel, unimpeded, for the time being, by any judicial interference, for the accomplishment of the
75 purposes aforesaid, was and is, indispensable.

The undersigned further causes the court to be informed and advised that the said governor of the State of Colorado, in the exercise and discharge of his constitutional duties and powers in the premises, has issued orders and instructions to the undersigned in his official capacity, not to surrender or release the said military custody or charge of the said Moyer during the existence and continuing condition of affairs as aforementioned in said County of San Miguel, either upon writ of *habeas corpus* or otherwise, until otherwise commanded by him.

The undersigned further represents and cause the court to be informed that the respondent, Buckley Wells, is a subordinate military officer, under the direct command of the undersigned, and as such, all and singular the acts of the said Wells in the premises with reference to the arrest or detention of the said Moyer has been by virtue of express commands in that behalf issued to him by the undersigned.

Wherefore, the undersigned respondent respectfully prays that this Honorable Court should take no further cognizance in the matter of said writ of *habeas corpus*, save and except to quash and hold the same for naught. SHERMAN M. BELL,

Brigadier General and Adjutant General of the State of
76 *Colorado, in Immediate Command of the Military Forces of the State of Colorado, in the County of San Miguel.*

I, James H. Peabody, Governor of the State of Colorado and Commander in Chief of its military forces, do hereby officially certify that the matters and things set forth in the foregoing return are true, and that the arrest and present detention of the body of the said Charles H. Moyer was had and done in pursuance of the authority conferred upon me by the constitution of the State of Colorado, and for the purposes mentioned and set forth in the executive orders and proclamations referred to in said return, and that all and singular, the acts of the said Sherman M. Bell, as Brigadier and Adjutant General as aforesaid, were had and done by my express sanction, as Governor and Commander-in-Chief as aforementioned, and that in my judgment, upon a full and careful review of all the facts and the true situation as it exists in said San Miguel County, the continued retention of the person of said Charles H. Moyer by the authorities of the State is necessary as an essential step in the

restoration of public peace and order and the suppression of the existing state of rebellion and insurrection in said County.

In order to fully advise the Supreme Court of the State of the gravity and seriousness of the situation in said county, among and as a part of a mass of evidence submitted to me before issuing said proclamation and orders. I herewith furnish a true copy of
77 a communication received by me, viz:

To the Honorable James H. Peabody, Governor of the State of Colorado:

The undersigned residents, officials and citizens of the County of San Miguel, respectfully make to you the following statement of facts and petition:

That there are within the county of San Miguel a large number of persons now outside of the County of San Miguel, all of which persons, both within and without the county, are arming themselves and threatening to join forces within said San Miguel County, for the purpose of destroying property and inflicting personal injuries upon the citizens of said county. The persons who are in charge of said mob are the same persons who have heretofore within said county committed numerous acts of violence, some of which have resulted in murder and destruction of property; that said body of men are acting together, and by force will attempt to commit violence within said county and to offer violence to persons and property in said county, and are threatening to break and resist the laws of the state; that the civil authorities are unable to suppress the same and cannot provide safety to the persons and property of the residents of said San Miguel County; that your petitioners have reasonable apprehension that there will be a great loss of life and sacrifice of property unless immediate and decisive action be
78 taken through the military authorities to suppress and quiet this body of men.

Wherefore, Your petitioners pray that you, the Governor of said state, do forthwith order such portion of the National Guard as you may deem necessary, into active service in said San Miguel County, and that martial law be forthwith declared therein, and your petitioners particularly urge the necessity for immediate action in this regard as they apprehend that a large number of men now outside the county will attempt to enter the same within the next few hours.

Dated, Telluride, Colorado, March 23rd, 1904.

R. N. ROGERS, *Mayor.*
C. F. LOEBNITZ, *Alderman.*
M. A. WOOD, *Alderman.*
JAMES E. JARVIS, *Alderman.*
MICHAEL PERINO, *Alderman.*
JOHN P. OLSON, *Alderman.*
L. W. ALLEN, *City Attorney.*
JOHN HERRON,
Chairman, County Commissioners.
J. C. RUTAN, *Sheriff,*
By WILLARD RUNNELLS,
Deputy in Charge of Office.

Sheriff is in lower part of county and cannot be reached today. He is on official business.

E. C. HUME,
County Attorney.

E. N. SAVENDER.	G. W. SHOEMAKER.
L. C. ANDERSON.	G. W. TALLMAN.
L. C. LOMAX.	E. R. ATCHISON.
W. E. CRAIN.	C. L. WATSON.
W. M. RANDALL.	I. E. BROWN.
79 W. A. TAYLOR.	W. B. VAN ATTA.
W. W. CRAMER.	A. C. KOCH.
F. E. CRISTY.	CHAS. F. PAINTER.
W. E. WHEELER.	COOPER ANDERSON.
C. E. KRACAW.	S. A. BAILEY.
BULKELEY WELLS.	MARTIN A. CHASE.

That said communication is signed by the following public officials in said county, viz:

The Mayor of the City of Telluride (County Seat)
The City Attorney of Telluride,
Five Aldermen of Telluride,
The Chairman of County Commissioners of said county,
The Sheriff of San Miguel County, by his deputy,
The County Attorney of San Miguel County.

And by twenty-two other leading, law-abiding citizens and property holders in and tax payers of said county.

That the sheriff of said county, subsequently, on, to-wit, the 25th day of March, A. D. 1904, voluntarily mailed me the following (original) letter, signed by him in person:

Office of J. C. Rutan, Sheriff of San Miguel County, Colorado.

TELLURIDE, COLO., *March* 25, 1904.

80 Hon. James H. Peabody, Governor of the State of Colorado, Denver, Colorado.

DEAR SIR: I have today sent you the following telegram, to-wit: "I beg to confirm statement of facts and to join in petition sent you by citizens of San Miguel County on March twenty-third nineteen hundred four, and I hereby ratify signature of my name thereto by my deputy, Willard Runnells."

I beg now to hereby confirm the same.

Very respectfully, J. C. RUTAN.

I further certify that the condition of insurrection and rebellion recited in my said proclamation is not as yet fully suppressed owing to its magnitude and the number of lawless persons aiding and abetting the same and the ordinary civil authorities are wholly powerless to cope with the situation.

Given under my hand and the executive seal, this 21st day of April, A. D. 1904.

[SEAL.] JAMES H. PEABODY,
Governor of the State of Colorado and Commander-in-Chief of its Military Forces.

STATE OF COLORADO, *Office of Secretary of State:*

81 "EXHIBIT A."

UNITED STATES OF AMERICA, *State of Colorado, ss:*

I, James Cowie, Secretary of State, of the State of Colorado, do hereby certify that the annexed is a full, true, and complete transcript of the proclamation, declaring the County of San Miguel to be in a state of insurrection and rebellion, which was filed in this office the twenty-third day of March, A. D. 1904, at 3:50 o'clock P. M.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver, this eighteenth day of April, A. D. 1904.

JAMES COWIE,
Secretary of State,

[SEAL.] By —— ——, *Deputy.*

Proclamation.

STATE OF COLORADO,
EXECUTIVE CHAMBER,
DENVER.

Whereas, there exists in San Miguel County, Colorado, a certain class of individuals who are acting in conjunction with a certain large number of persons outside of said county, who are fully armed and acting together; and,

Whereas, Open and public threats have been made to resist the laws of this state and offer violence to citizens and property located in said San Miguel County; and,

Whereas, At divers and sundry other times various crimes have been committed in San Miguel County, by, or with the aid
82 and under the direction of said vicious and lawless persons; and,

Whereas, Threats, intimidations and violence are threatened and believed will be resorted to by said lawless class of individuals; and,

Whereas, It is stated to me by the Sheriff of said San Miguel County, that these forces within and without said county are about to join forces within said San Miguel County, for the purpose of destroying property and inflicting personal injuries upon the citizens of said county; and,

Whereas, By reason of such lawlessness and disturbances, and

threatened acts of violence, the civil authorities are unable to cope with the situation,

Now, therefore, I, James H. Peabody, Governor and Commander-in-Chief of the Military Forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said County of San Miguel, in the State of Colorado, to be in a state of insurrection and rebellion.

In testimony whereof, I have hereunto set my hand and caused the Great Seal of State to be affixed, at Denver, the State Capital, this twenty-third day of March, A. D. one thousand nine hundred and four.

[SEAL.] JAMES H. PEABODY.

By the Governor, Attest:
JAMES COWIE,
Secretary of State.
TIMOTHY O'CONNOR, *Deputy.*

(Endorsed:) Proclamation. San Miguel County to be in a state of insurrection and rebellion. Filed in the office of the Secretary of State, of the State of Colorado, on the 23 day of March, A. D. 1904, at 3:50 o'clock P. M. James Cowie, Secretary of State, by Timothy O'Connor, Deputy.

83 "EXHIBIT B."

Executive Order.

STATE OF COLORADO,
EXECUTIVE CHAMBER,
DENVER.

Ordered.

It having been made to appear to me by the Mayor of Telluride, by five of the City Aldermen, the City Attorney, the Chairman of the Board of County Commissioners of San Miguel County, and the Sheriff thereof, together with numerous other officials and citizens of Telluride and San Miguel County, that there is within the County of San Miguel a large number of persons working in sympathy and harmony with a large number of persons outside of said county, who are arming themselves and threatening to join forces within said San Miguel County, for the purpose of destroying property and inflicting personal injuries upon the citizens of said San Miguel County, and that said bodies of men are acting together, and by force attempting to commit felonies within said county, and to offer violence to persons and property, and are threatening to break and resist the laws of this State, and that the civil authorities within said town and county are unable to suppress the same or to provide safety to the persons or property of the residents of said San Miguel County, and that the conditions require immediate action to avoid the breaking out of a riot within a few hours, and that the

Sheriff of said San Miguel County has notified me that he is unable to preserve and maintain order and secure obedience to the laws of this State, and to protect the lives and property of the citizens of said county;

I therefore direct you, in pursuance of the power and authority vested in me by the Constiution and laws of this State, to forthwith order out such troops as in your judgment may be necessary, and to report forthwith to the Sheriff of said San Miguel County, Colorado, and that you use such means as you may deem right and proper, acting in conjunction with, or independently of, the civil authorities of said San Miguel County as in your judgment and discretion conditions demand, to restore peace and good order in said community, and to enforce obedience to the Constitution and laws of this
84 State.

Given under my hand and the Executive Seal this twenty-third day of March, A. D. 1904.

(Signed) JAMES H. PEABODY,
Governor and Commander-in-Chief.

To Sherman M. Bell, Adjutant General of the State of Colorado:

I, Samuel Hamill Wood, Secretary to the Governor of the State of Colorado, do hereby certify that the above and foregoing is a full, true and complete copy of an Executive Order issued by His Excellency, James H. Peabody, Governor of the State of Colorado, dated March twenty-third, A. D. 1904, ordering troops to San Miguel County, as the same appears of record in the Governor's office, at page 106, Executive Order Book No. 4.

SAMUEL H. WOOD,
Private Secretary.

In the Supreme Court of the State of Colorado.

No. —.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

The people of the State of Colorado to Sherman Bell and Buckley Wells, Greeting:

We command you and each of you that you have the body of one Charles H. Moyer, by you imprisoned and detained as it is averred, together with the time and cause of such imprisonment and detention, by whatsoever name the said Charles F. Moyer shall be called or charged, before the Supreme Court of the State of Colorado, at the Court Room thereof, in the State Capitol Building, in the
85 City and County of Denver, on Thursday, the 21st day of April, 1904, at two o'clock P. M., of that day, to do and receive what shall then and there be considered concerning the said Charles H. Moyer.

Witness the Honorable William H. Gabbert, Chief Justice of the said Supreme Court at the Court Room thereof, in the City and County aforesaid, on this the 15th day of April, A. D. 1904.

Attest my hand and the seal of said court, the day and year last above written.

H. G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
[SEAL.] By JOHN B. COOKE, *Deputy.*

(Endorsed:) In the Supreme Court of the State of Colorado. *In Re* Charles H. Moyer. Writ of *habeas corpus.* The sum of $45.00 shall be tendered at the time of the service of this writ, to the persons therein named to cover the expense of bringing the said prisoner as herein commanded. "By the *habeas corpus* act."

(Endorsed:) No. 4828. In the Supreme Court, State of Colorado. *In Re* Charles H. Moyer. Return to writ of *Habeas Corpus,* including objections to further exercise of jurisdiction by the Court, and copies of divers annexed Executive Orders, etc. N. C. Miller, Att'y Gen'l, State of Colorado, appearing for respondents. Jno. M. Waldron, Special Counsel. Filed in Supreme Court Apr. 21,
86 1904. Horace G. Clark, Clerk.

In the Supreme Court of the State of Colorado.

No. 4828.

In re CHARLES H. MOYER.

Petition for Original Writ of Habeas Corpus.

Comes now the petitioner, Charles H. Moyer, and for his reply or answer to the return of Sherman Bell and Buckley Wells, heretofore made in the above entitled matter, alleges and says:

First. That the said return shows upon its face that the said return fails to state facts constituting any return or answer to the writ heretofore issued herein.

Second. That the said return is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment, detention or further detention of the said petitioner.

Third. That upon face of the said return this petitioner is entitled to his discharge.

Fourth. That neither the Governor of the State, nor the said respondents Bell and Wells, are either or any or all of them, either under the circumstances alleged in said return, or under any other circumstances, appearing upon the face of the papers in the proceeding, either authorized to arrest, detain, hold or continue to detain the body of your petitioner.

87 Fifth. That there exists no power in the Governor of the State of Colorado, or in the said Bell or in the said Wells, to suspend the privilege of the writ of *habeas corpus.*

Sixth. That under the said answer and return, the petitioner is entitled to the privilege of said writ, and is entitled to an order of this court for his discharge, for the reason that no authority whatsoever is shown by the said answer and return which authorizes the arrest, imprisonment, detention or further detention of this petitioner.

Seventh. This petitioner alleges that neither on the 23rd day of March, A. D. 1904, nor at any other time, has there been a state of either insurrection or rebellion, either against the government or constitution or laws of the State of Colorado, which either existed or exists in the County of San Miguel in the State of Colorado. On the contrary this petitioner avers, in that connection, that the said County of San Miguel and State of Colorado was, on said day, and for a long time prior theretofore had been, in a state of peace and not of rebellion or insurrection. That shortly before said time a certain organization called The Citizens' Alliance, of the City of Telluride in said County, was effected and brought into existence by certain mine owners, mine operators, merchants, bankers, liquor dealers and gamblers of the said City of Telluride, for the purpose of controlling the miners of that county, in violation of law
88 and in the supposed interests of the said mine owners, mine operators, merchants, bankers, liquor dealers and gamblers, and, to that end, they had, shortly before the said date, organized themselves into a mob, and had deported about seventy men who had theretofore been miners, working in the various mines of that county. That these miners announced their intention of returning peaceably to their homes in said city and county, and they further announced that to that end they would resist any further interference with their persons and would resist any attempts at their redeportation, but that their mission in returning was one of peace, and no force whatever would be used by them, in any way, shape or form, except in the defense of their persons from attack by the said mob or any member thereof. Thereupon certain members of the said mob, whose names are signed to the alleged petition to the Governor of the State, set forth as an exhibit in the said return, did at once make the representations to the Governor of the State of Colorado as therein set forth, which said representations were a part of the plan of action theretofore agreed upon by the members of the said Citizens' Alliance, for the purpose of controlling the said labor situation. That all of said proceedings were a part of and done in pursuance of a conspiracy entered into by the said members of the said Citizens' Alliance, as heretofore and in the petition herein set forth.

Eighth. That as to what the said respondent Bell may be-
89 lieve either in good faith or otherwise, this petitioner is not informed, but he avers, in this connection, that he is in no wise responsible therefor, and that, as a matter of fact, this petitioner has neither been at any time nor does he nor would he continue to be an active or any participant either in fomenting or keeping alive any condition of insurrection or rebellion, either as recited or set forth in said executive order, or otherwise. On the contrary he has

been at all times a law-abiding citizen of the State of Colorado and has at all times and in all places carried and conducted himself in strict conformity to the laws of the land and has advised, in his capacity as President of The Western Federation of Miners, at all times and in all places, that no act of lawlessness occur upon the part of any member of the said Federation, to the end that no reflection might be cast upon said organization as other than a law-abiding, peaceable, conservative and order loving organization existing for the purpose of bettering the social and financial conditions of its various members. But, in this connection, this petitioner avers that whatever the judgment or belief of the Governor or the respondents Bell and Wells may be with reference to this petitioner, his arrest, incarceration and detention is in violation of the laws of the land and of the Constitution of the United States and of the State of Colorado.

Ninth. He denies either that his present or further detention is in any wise essential to the ends of public justice, or the restoration of public tranquil-ity, or the suppression of any state of insurrection or rebellion, either as set forth in the answer or return, or otherwise, and denies that any insurrection or rebellion exists; but, whether it does or does not, this petitioner avers is wholly immaterial, since neither the Governor nor the respondents Bell or Wells have any power whatsoever over the said writ or the suspension of the privileges thereof.

90

Tenth. This petitioner denies that the uninterrupted exercise of the military force of the state, in said County of San Miguel, is at all necessary; denies that they should be unimpeded for the time being, or at all, by any judicial interference, or that it either was or is indispensable for the accomplishment of any of the purposes mentioned in said answer and return. On the contrary, this petitioner avers that the said military force, under command of the Governor of this state, and the said respondents Bell and Wells, is acting in violation of the Constitution and statutes of the state—is declaring and asserting that it is superior to the civil authorities and is authoried to act in contravention of that power, and that said power is in subordination to it. That it is violating the rights of your petitioner under the Constitution of the United States and the Constitution of the State of Colorado, as set forth in the said petition and as is shown by the said answer and return.

91

Wherefore, having fully answered and replied to the said answer and return, your petitioner prays as he hath heretofore prayed in his petition, and here and now moves the court, upon the face of said answer and return, that he be discharged from the custody of the respondents.

RICHARDSON & HAWKINS,
Attorneys for Petitioner.

STATE OF COLORADO, *City and County of Denver, ss:*

Charles H. Moyer, being first duly sworn, doth depose and say: That he has heard read the foregoing answer and reply to the re-

turn of the respondents in the above entitled matter, and knows the contents thereof, and that the matters and things therein stated are true as therein stated. And further affiant saith not.

CHARLES H. MOYER.

Subscribed and sworn to before me, this 21st day of April, A. D. 1904.

My commission expires June 9, 1907.

CHARLES E. OEHLER,
[SEAL.] *Notary Public.*

(Endorsed:) In the Supreme Court of the State of Colorado. No. 4828. *In Re* Charles H. Moyer. On Petition for Original
92 Writ of *Habeas Corpus*. Reply to return of Sherman Bell and Buckley Wells. Filed in Supreme Court Apr. 21, 1904, Horace G. Clark, Clerk.

THURSDAY, *April 21st, A. D.* 1904.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

Now comes E. F. Richardson, Esquire, attorney for petitioner, and Nathan C. Miller, Esquire, Attorney General of the State of Colorado, and John M. Waldron, Esquire, attorneys for respondents also come; and thereupon this cause is argued orally upon the rule to show cause and submitted to the consideration and judgment of the court.

THURSDAY, *April 25th,* 1904.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

At this day upon consideration thereof, it is ordered by the court that the application for bail in this cause pending the petition for a writ of *habeas corpus* be and the same is hereby denied, and that the final hearing be had on May 5th and 6th instant.

No. 4828.

In the Matter of the Petition of CHARLES H. MOYER for the Writ of *Habeas Corpus.*

93 *Original Proceeding.*

Mr. Justice STEELE delivered the opinion of the court:

Upon the return day of the writ, and pursuant to its commands, the respondents named in the writ produced the body of the petitioner. Upon the same day, Sherman M. Bell, as brigadier general and adjutant general of the state, made return to the writ, and therewith filed objections to the further exercise of jurisdiction by the court. From the return it appears that on the 23d day of March, 1904, the governor of the state, by his proclamation, proclaimed and declared the County of San Miguel to be in a state of insurrection and rebellion; that immediately after the issuance of the proclamation the governor commanded the respondent to forthwith proceed to the county of San Miguel with such portion of the national guard of the state as might be deemed essential, and to use such means as might be deemed necessary, for the restoration of peace in said county and for the effectual suppression of the insurrection and rebellion; that, pursuant to the command of the governor, he proceeded to the county of San Miguel with a portion of the national guard of the state; that after his arrival at the county of San Miguel he became satisfied and convinced that the said Moyer was a prominent leader of bands of lawless men engaged in acts of insurrection and rebellion, and that so believing he caused the arrest and detention of said Moyer; that in his judgment, in order to
94 prevent the said Moyer from lending aid, comfort and direction to the lawless persons now engaged in rebellion in said county, and in order to restore public tranquil-ity, it is absolutely necessary to detain said Moyer and restrain him of his liberty. That as the officer in command of the national guard, now on duty, he detains the said Moyer, and that he has been commanded by the governor of the state not to surrender or release the said Moyer during the existing and continuing condition of affairs in said county, either upon writ of *habeas corpus* or otherwise, until further orders.

Attached to the return is a certificate of the governor in which he states that the facts contained in the return are true, and that the arrest and detention of said Moyer were effected under his direction as governor and commander in chief of the national guard of the state, and that in his judgment the continued retention of the person of said Moyer is a necessary and essential step in the restoration of public peace and order and the suppression of the existing state of insurrection and rebellion in said county.

When the return was presented, the attorney for the petitioner requested that the date for the hearing upon the merits be fixed by the court within five days from the return day of the writ, in

accordance with section 2108 Mills' Annotated Statutes; and stated that unless the cause should be set within five days, the petitioner desired to be admitted to bail. The application for bail is
95 resisted by the governor upon the ground that as, in his judgment, the detention of the petitioner is a military necessity, the court is without authority in the premises.

Our authority to issue the writ is derived from the constitution, and not from the statute; and when this court in the exercise of its original jurisdiction issues the writ, the practice is governed, not by the statute, but by the rules of the court. By the adjudicated cases it is held that upon the return of the writ the original custody terminates, and that the prisoner is then in the custody of the court, and that pending the hearing the court may in its discretion admit him to bail or remand him to the officer who had him in charge, or make such order in the case as shall be deemed proper.

Mr. Justice Swayne, speaking for the supreme court of the United States, in the case of Barth *v.* Clise, reported in 12 Wallace at page 400, said:

"By the common law, upon the return of a writ of *habeas corpus* and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of *habeas corpus*. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement
96 under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded."

The rules announced in the cases cited are probably not applicable to cases like the present, where the executive head of the government, at the time of the return, questions the jurisdiction of the court, and states that he holds the petitioner by virtue of his authority under the constitution as the commander in chief of the national guard. And we are required at this time to assume further jurisdiction or to hold the question of jurisdiction in abeyance by remanding the petitioner to the custody of the respondents. We have undoubted authority to issue the writ in the first instance, but whether our jurisdiction continues depends upon circumstances. In the case at bar the respondent declares that he detains the petitioner as a military necessity, and that he has been commanded by the governor to not surrender the petitioner, either upon writ of *habeas corpus* or otherwise. The question, then, as presented by the return, is: Can the governor, under the constitution, and under the conditions shown to exist, declare martial law and as incident thereto suspend the privilege of the writ of *habeas corpus?* If the constitution authorizes the governor so to do, then we have no further jurisdiction. If the power to declare martial law and to suspend
97 the privilege of the writ of *habeas corpus* is confided by the constitution to the legislature, the governor is without author-

ity to detain the petitioner, and we have jurisdiction to discharge him.

At the time of the issuance of the writ, it was stated that we reserved the right to pass upon the question of our jurisdiction when final disposition was made of the case; and if we were now to admit the prisoner to bail we should, in effect, determine that we have jurisdiction, and should, pending the hearing, grant all the relief that the petitioner demands. If the liberty of the petitioner alone were involved, we should probably resolve the doubt in his favor, admit him to bail, and determine the question of jurisdiction afterward; but the head of the executive department of the state has stated in the return to the writ that in his solemn judgment peace and tranquil-ity cannot be speedily restored in the county of San Miguel, unless the petitioner remains in the custody of the military authority. Therefore the matter involved affects not only the liberty of the petitioner, but the peace of the people of San Miguel, and incidentally the tranquil-ity of the people of the entire state. Although many of the averments of the return are denied, we shall accept, for the purpose of determining the question here presented, the statements therein contained as true. And if they are so accepted, we should not admit the petitioner to bail in the face
98 of the declaration of the governor that the petitioner has aided and abetted those who stand in defiance of the law, and that he is the leader of a band of lawless men engaged in acts of insurrection. To admit the petitioner to bail before we have determined the main question, would, it seems to us, be invading the legitimate province of the executive department, and that we are restrained from doing by the fundamental law.

Nothing we have said should be regared as foreshadowing the decision upon the important questions which must necessarily be determined upon the final hearing.

Although the chapter of the statutes on the subject of *habeas corpus* is not applicable to original proceedings in this court, we usually adopt the statute for our guidance on questions of practice; and we should set the hearing of this case within five days from the return day of the writ if all the members of the court could then be present. The questions involved affect the privileges and liberties of the people of the whole state, and we think these questions are so important as to require that all the members of the court participate in their determination. We shall therefore decline to set the cause within the time fixed by statute, but do set it for hearing on Thursday, May 5th, at the hour of ten o'clock.

The application for bail is denied.

Campbell, J., not participating.

99 (Endorsed:) Filed in Supreme Court Apr. 25, 1904. Horace G. Clark, Clerk.

THURSDAY, *May 5th*, 1904.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

Now comes E. F. Richardson, Esquire, Attorney for petitioner, and John M. Waldron, Esquire, and Nathan C. Miller, Esquire, Attorney General of Colorado, attorneys for respondents also come; and thereupon this cause is argued orally in part and continued for further argument until tomorrow, at ten o'clock A. M.

FRIDAY, *May 6th*, 1904.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

Now comes E. F. Richardson, Esquire, attorney for petitioner, and John M. Waldron, Esquire, and Nathan C. Miller, Esquire, Attorney General of Colorado, attorneys for respondents also come; and thereupon this cause is argued orally and submitted to the consideration and judgment of the court.

No. 4828.

In re CHARLES H. MOYER.

100 *Original Application for Writ of Habeas Corpus.*

On behalf of Charles H. Moyer a petition was presented, representing that he was illegally restrained of his liberty in the County of San Miguel, by Sherman Bell and Bulkeley Wells. A writ of *habeas corpus* was issued, directed to these parties, who, on the day it was returnable, produced the petitioner in court, and at the same time made a return to the writ, whereby the jurisdiction of this court to further proceed in the matter was challenged. The averments upon which the claim of want of jurisdiction is based are to the effect that prior to the detention of petitioner, His Excellency, Governor Peabody, by proclamation, had determined and declared the county of San Miguel to be in a state of insurrection, and that by reason of lawlessness, disturbances and threatened acts of violence, the civil authorities of the county were unable to cope with the situation. In pursuance of this proclamation, the Governor directed the respondent, Sherman M. Bell, Adjutant General of the State of Colorado, to

forthwith order out such troops as in his judgment might be necessary, and report to the sheriff of San Miguel County, and that he use such means as, in his judgment, might be right and proper to restore peace and good order to the county, and enforce obedience to the Constitution and laws of the state. In pursuance of this order, General Bell proceeded to the county of San Miguel in charge and command of members of the Colorado National Guard, and
101 ever since has been, and now is, actively engaged in quelling the disturbances which called forth the proclamation and the executive order above referred to; that in the discharge of these duties he became convinced that petitioner had been, and if discharged from arrest, would continue to be, an active participant in fomenting and keeping alive the condition of insurrection existing in the county; that he was and is a prominent leader of those engaged in the acts of insurrection and crime to suppress which the National Guard was called into requisition; that for these reasons, he caused the arrest, apprehension and detention of the petitioner in the county of San Miguel, and does now restrain, detain, and imprison him for the reasons and upon the grounds above set forth; that it is his purpose and intention to release and discharge petitioner from military arrest as soon as the same can be safely done with reference to the suppression of the existing state of insurrection in the county, and then surrender him to the civil authorities to be dealt with in the ordinary course of justice, after such insurrection is suppressed. It is further stated that the governor has issued orders and instructions to General Bell not to surrender or release the military custody of petitioner during the existence and continuing condition of affairs in the county of San Miguel, as mentioned and set forth in the proclamation and executive order of His Excellency. It is also stated that the respondent, Bulkeley Wells,
102 is a subordinate military officer, under the direct command of General Bell, and that his acts in the premises with reference to the arrest and detention of petitioner have been by virtue of express commands in that behalf issued to him by his superior officer. To this return is appended the certificate of Governor Peabody, to the effect that the matters and things set forth in the return are true, and that the arrest and present detention of petitioner were had and done in pursuance of the authority conferred upon him by the Constitution of the state; that the acts of General Bell in arresting and detaining petitioner were done by his express sanction as governor of the state and commander-in-chief of its military forces; and that the insurrection recited in his proclamation has not as yet been fully suppressed. To this return a reply was filed by petitioner in the nature of a general demurrer, to the effect that it is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment or further detention of petitioner. The reply also alleges that neither on the date of the proclamation and order of the governor, nor at any other time, has there been a state of insurrection in the county of San Miguel.

Chief Justice GABBERT delivered the opinion of the court:

Counsel for petitioner contend that on the facts above stated he is entitled to his discharge, because the governor has no power to suspend the privilege of the writ of *habeas corpus*, or declare
103 martial law, or that, if he has such power, he has not assumed to exercise it. Special counsel representing the respondents controverts these propositions, and further contends that this court is without jurisdiction to proceed further than to deny the relief demanded, or remand the petitioner to their custody. The attorney general claims that the governor, independent of the questions of his power to declare martial law, suspend the privilege of the writ of *habeas corpus*, or the question of the jurisdiction of this court, is fully authorized, under the Constitution and laws of the state to suppress insurrection and lawless conditions through the power of the military under his command, and that his subordinate officers actively engaged in suppressing such insurrection by seizing and holding those engaged in acts of violence or in advising and aiding such acts to suppress which the military was called out, cannot be interfered with so long as conditions exist which require the action and the presence of the military to correct. Counsel *amici curiæ*, in their views on these several questions, are divided.

The purpose of proceeding in *habeas corpus* is to determine whether or not the person instituting them is illegally restrained of his liberty, and we shall proceed to determine whether or not, under the facts stated and the laws of this state, the petitioner is entitled to his discharge, without attempting to pass specifically upon the questions raised by his counsel. Before proceeding, however,
104 to a discussion and determination of this question, two propositions, are presented which should be disposed of. It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but, rather, as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or, rather, is required to do, under the law by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer the writ.

In re Chipchase, 56 Kan., 357; 43 Pac. 264;
Ex parte Durbin, 14 S. W. (Mo.), 821;
Simmons *v.* Georgia Iron & Coal Co., 61 L. R. A., 739.

By the reply it is alleged that, notwithstanding the proclamation and determination of the governor that a state of insurrection existed in the county of San Miguel, that, as a matter of fact, these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By § 5, Art. IV of our
105 Constitution, the governor is the commander-in-chief of the military forces of the state, except when they are called

into actual service of the United States, and he is thereby empowered to call out the militia to suppress insurrection. It must, therefore, become his duty to determine as a fact when conditions exist in a given locality which demand that in the discharge of his duties as Chief Executive of the state, he shall employ the militia to suppress. This being true, the recitals in the proclamation, to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another co-ordinate branch of the state government.

In re Boyle, 57 Pac. (Idaho), 706;
Luther *v.* Borden, 7 How., 1;
Ex parte Moore, 64 N. C., 802;
Martin *v.* Mott, 12 Wheat., 19.

By the Constitution the supreme executive power of the state is vested in the governor, and he is required to take care that the laws be faithfully executed—§ 2, Art. IV. To this end, he is made commander-in-chief of the military forces of the state, and vested with authority to call out the militia, to execute the laws and suppress insurrection—§ 5, *supra*. This authority is supplemtnal by the laws of 1897—p. 204, § 2—whereby it is provided that when an
106 insurrection in the state exists or is threatened, the governor shall order out the National Guard to suppress it. These are wise provisions, for the people in their sovereign capacity, in framing the Constitution, as well as the General Assembly, recognized that an insurrection might be of such proportions that the usual civil authorities of a county and the judicial department would be unable to cope with it. Through the latter parties engaged in such insurrection might be punished, but its prompt suppression could only be secured through the intervention of the militia. Being vested with authority to employ the militia for a specific purpose, and it appearing from the return to the writ that the governor has called it into requisition for that purpose, his action through his subordinates cannot be interfered with, so long as he does not exceed the power which, under the fundamental law of the state and the acts of the Legislature in conformity therewith, he is authorized to exercise.

People *v.* District Court, 29 Colo., 182 (205).

The crucial question, then, is simply this: Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed to exercise it, which are not expressly or impliedly prohibited.

1 Story on the Constitution, 434.

Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained.
107 So with the Constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights.

In suppressing an insurrection it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. Without such authority, the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct. If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished The power and authority of the militia in such circumstances are not unlike that of the police of a city, or the sheriff of a county, aided by his deputies or *posse comitatus* in suppressing a riot. Certainly, such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed—Hallett, J., *In re* Application of Sherman Parker. If, as contended by counsel for petitioner, the
108 military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that on the arrest of a rioter by the military he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored, would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest
109 and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice, and tried for such offense against the law as he may

have committed. It is true that petitioner is not held by virtue of any warrant, but if his arrest, and detention are authorized by law, he cannot complain because those steps have not been taken which are ordinarily required before a citizen can be arrested and detained.

Nor do these views conflict with — 22 of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power. The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens. No case has been cited where the precise ques-
110 tion under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it.

In re Kemp, 16 Wis., 382 (413);
Luther *v.* Borden, *supra;*
Johnson *v.* Jones, 44 Ill., 142.

The same rule necessarily applies to those found in the zone of the disaffected district who are aiding and abetting the insurrectionists; for such conduct, unless repressed, would result in the continuation of the insurrection, or at least, render it more difficult to suppress. We therefore reach the conclusion that, independent of the questions of the authority of the governor to declare martial law, or suspend the privilege of the writ of *habeas corpus,* that the petitioner, on the showing made by the return, is not illegally restrained of his liberty. In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is, does it exist? If so, then the governor cannot be deprived of its exercise. The
111 prime idea of government is that power must be lodged somewhere for the protection of the commonwealth. For this purpose, laws are enacted and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals of a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudice, and often given weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it.

1 Story on the Constitution, 425;
1 Bailey on Jurisdiction, 296, p. 309.

Many authorities have been cited by counsel for petitioner which it is not necessary to attempt to review. They are not in conflict with the conclusions reached in this case. They treat of the power of the president, to declare martial law; to suspend the privilege of the writ of *habeas corpus;* of the authority of the military to arrest, try and punish persons not actually in the military service; and when the military may or may not temporarily supersede the usual civil authorities. None of these questions are involved in the present case. In fact, counsel for petitioner practically concede that the questions of the authority of the governor to declare martial law, and suspend the writ of *habeas corpus* are not involved, because, they say, if he has such authority he has not
112 assumed to exercise it; but it is immaterial what power in this respect may be vested in the governor, or whether he has, in fact, attempted to declare martial law or suspend the writ of *habeas. corpus.* The petitioner was lawfully arrested by the military authorities while the work of suppressing the insurrection in San Miguel County was in progress. Such arrest being lawful, his restraint by respondents until it is suppressed is not illegal.

The writ is discharged, and the petitioner remanded to the custody of the respondents.

Writ discharged and petitioner remanded.

Steele, J., dissents.

Filed June, 6th, 1904.

HORACE G. CLARK, *Clerk.*

Order.

JUNE 6TH, 1904.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

At this day, upon consideration of the petition of Charles H. Moyer for a writ of *habeas corpus* herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and the court being now sufficiently advised in the premises,

It is therefore ordered by the court that the writ heretofore
113 issued herein be, and the same is hereby, discharged, and the petitioner remanded to the custody of the respondents. And let the opinion of the court filed herein be recorded.

Order.

MONDAY, *July 3rd, A. D.* 1905.

No. 4828.

In re Application of CHARLES H. MOYER for a Writ of *Habeas Corpus.*

Writ of Habeas Corpus.

At this day, it is ordered by the court, that the request of the petitioner to withdraw the petition for a rehearing heretofore filed herein, be, and the same is hereby granted.

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify that the foregoing is a true copy of the original pleadings (consisting of the petition, writ of *habeas corpus*, motion to quash, return to writ and reply to return), opinion of the court on motion to quash, all orders entered of record, the opinion of the court, the final judgment, in the case entitled "*In re* Charles H. Moyer," No. 4828, heretofore filed and now remaining of record in my office.

Witness my hand and the seal of said Supreme Court, affixed at my office, in the City of Denver, this twentieth day of November, A. D. 1905.

HORACE G. CLARK,
114 *Clerk Supreme Court,*

[Seal of Supreme Court of Colorado.]

JAMES PERCHARD, *Deputy.*

(Endorsed:) No. 4828. In Supreme Court State of Colorado. *In re* Chas. H. Moyer *vs.* Jas. H. Peabody *et al.*, Respondents. Certified transcript of record.

(Endorsed:) 4707. U. S. Circuit Court, District of Colorado. Charles H. Moyer *vs.* James H. Peabody *et al.* Certified transcript of record from Supreme Court *In re* Charles H. Moyer. Filed Dec. 14, 1905, Charles W. Bishop, Clerk.

Seventh-ninth Day, May Term, Tuesday, September 25th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the first day of May, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

Action for Damages.

At this day comes the plaintiff by E. F. Richardson, Esquire, his attorney and the defendants by John M. Waldron, Esquire, their attorney also comes,

And thereupon by agreement of counsel it is considered that the transcript of the record from the Supreme Court of the State of Colorado, No. 4828, In the Matter of Charles H. Moyer, Petition for Original Writ of *Habeas Corpus*, filed herein be taken and
115 considered to be a part of the amended complaint herein.

And the demurrer to the amended complaint herein coming on now to be heard is argued by counsel to the hour of adjournment.

Eightieth Day, May Term, Wednesday, September 26th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the first day of May, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY ET AL.

Action for Damages.

At this day come again the parties to this case by their attorneys respectively. And the demurrer to the amended complaint herein coming on now to be heard is argued by counsel to the hour of adjournment.

Eighty-first Day, May Term, Thursday, September 27th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the first day of May, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY ET AL.

Action for Damages.

At this day come again the parties to this case by their attorneys respectively and the demurrer to the amended complaint herein coming on now to be heard is argued by counsel, and by the court taken under advisement.

Ninetieth Day, May Term, Monday, November 5th, A. D. 1906.

116 Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the first day of May, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY ET AL.

Action for Damages.

At this day it is ordered by the court that this case be, and the same is hereby, continued to the next term of the court.

Twelfth Day, November Term, Monday, November 19th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

Action for Damages.

At this day come the defendants by John M. Waldron, Esquire, their attorney, and the demurrer to the amended complaint herein,

having heretofore come on to be heard, and having been argued by E. F. Richardson, Esquire, attorney for the plaintiff, and by John M. Waldron, Esquire, attorney for the defendants, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the amended complaint herein is not sufficient in law to be answered unto. And so the demurrer is hereby sustained.

And thereupon, on motion of the defendants, it is ordered
117 by the court that the attorneys for the parties may withdraw permanently from the files of the court herein the briefs filed by them respectively upon leaving receipts therefor with the clerk of this court.

Twenty-fourth Day, November Term, Tuesday, December 4th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

Action for Damages.

At this day comes the plaintiff by E. F. Richardson, Esquire, his attorney, and the defendants by John M. Waldron, Esquire, their attorney, also come. And thereupon the plaintiff saith that he will and doth hereby elect to stand upon his amended complaint herein and declines to plead further.

Thereupon it is considered by the court that this cause be and the same is hereby dismissed out of this court, and that the defendants go hence hereof without day and have and recover of and from the plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And thereupon, on motion of plaintiff, it is ordered by the court that he have day and to and including sixty (60) days from
118 this day within which to file herein a bill of the exceptions by him reserved herein; and bond on writ of error shall be in the sum of five hundred dollars ($500).

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the United States Circuit Court.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Be it remembered that heretofore and on, to-wit, the 25th day of September, A. D. 1906, the above entitled cause came on to be heard on the joint and several demurrer of the defendants to the amended complaint of the plaintiff, when the same was argued, and the court not being fully advised in the premises did take the same under advisement.

Be it further remembered that on the 19th day of November, A. D. 1906, the court being fully advised in the premises did enter an order sustaining the said demurrer, to which said order, so sustaining the demurrer as aforesaid, the plaintiff, by his counsel, then and there asked and was allowed an exception.

And upon the entry of the said order so sustaining the said demurrer, as aforesaid, the said court, by the judge thereof,
119 did then and there render an opinion in writing, which was and is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the United States within and for the District of Colorado.

No. 4707.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN BELL, and BULKELEY WELLS, Defendants.

Statement of Facts.

The plaintiff alleges in the declaration that he is a citizen of the United States, and a citizen and resident of the State of Colorado; that the defendants also are citizens of the United States, and citizens and residents of the State of Colorado; that he "brings this action in this court against said defendants under the Constitution of the United States, and under Sec. 1979 of the Revised Statutes of the United States, and under Sec. 1979 of the Revised Statutes of the United States by reason of the fact, as will more fully appear hereinafter in this complaint, that the defendants under color of the Constitution of Colorado, and the laws thereof, subjected this plain-

tiff to the deprivation of rights, privileges and immunities
120 secured to him by the constitution and laws of the United States;" that the defendant, Peabody, was elected governor of said state in November, 1902, for a term of two years, beginning January 13, 1903; that the defendant, Bell, was appointed Adjutant General of the National Guard of the State of Colorado, and the defendant, Wells, was appointed Captain of a company in said guard, by the defendant Peabody, as Governor; that the defendant Peabody, as commander-in-chief of the said militia, and the defendant Bell, as adjutant general, directed and caused a portion of the said national guard of Colorado to assemble in the City of Telluride, San Miguel County, Colorado; that while so assembled, said guard was under the direction, orders and control of the defendant Peabody, as commander-in-chief, and the defendant Bell, as adjutant general, and the defendant Wells, as captain; that on March 30, 1904, the defendants, acting as officers of said national guard, gave directions to, and caused a squad of men, being a part of said national guard, to arrest the plaintiff and imprison him in the city jail in the town of Telluride; that the plaintiff was confined and kept, forcibly and against his will, from March 30, 1904, until June 15, 1904, and with force and arms was restrained of his liberty and subjected to hardships, privations, humiliations and disgrace; that the defendants claimed the right to arrest and detain the plaintiff by
virtue of their being officers of the State of Colorado, and
121 under the laws of Colorado, to-wit: Sec. 2 of Art. 4 of the Constitution of Colorado, which is as follows: "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws shall be faithfully executed." And Sec. 5 of Art. 4 of said constitution, as follows: "The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, suppress insurrection and repel invasion;" that defendants claimed other statutes of Colorado gave them also the right to arrest, imprison and detain the plaintiff, but that plaintiff is unable to find said statute; that after the arrest and detention of the plaintiff by the defendants, he made application to the Supreme Court of the State of Colorado, the highest court and court of last resort in said state, for a writ of *habeas corpus*, in which application the plaintiff asserted that he was deprived of his liberty contrary to the laws of the State of Colorado, and of the laws of the United States, and said court allowed the writ to issue. That in their return to said writ, Peabody, Bell and Wells did not claim that the courts of said state, or in any part of said state, were overthrown and that a trial could not be had to determine any charge of crime made against the plaintiff; that Adjutant General Bell, in his return to the writ, asserted that he was the
122 adjutant general of the national guard of Colorado; that the governor of Colorado had given him orders to arrest and detain the plaintiff, and not to release him under any circumstances until further orders from the governor; that the said Wells was at the time a subordinate military officer under the direct command of

said Bell, and the defendant Peabody certified to the correctness of said statement in Bell's return to the writ; and the said Peabody also stated that he was acting in his official capacity under the laws of Colorado relating to the arrest, detention and imprisonment of the said Moyer; that the Supreme Court of the State of Colorado refused to admit Moyer to bail, and finally rendered a judgment in said *habeas corpus* proceedings to the effect that the governor of the state, and the other respondents therein might, as officers of the State of Colorado, under the authority vested in them under the constitution and the sections above quoted, and the statutes of said state, hold and detain said Moyer until, in their judgment, they saw fit to release him; that this was deprivation of liberty without due process of law; that by the acts and decisions of said Supreme Court plaintiff cannot obtain in the courts of Colorado any redress for the wrongs so inflicted upon him; that said decision is contrary to the provision of the constitution and the laws of the United States relative to personal rights; that the arrest and imprisonment of the plaintiff was
123 without probable cause and without legal process or color thereof, and not in due course of law; that the conduct of the defendants was in disregard of the rights of the plaintiff, guaranteed to him by the constitution and the laws of the United States; that the plaintiff was a law-abiding citizen; that he was not a member of the national guard of the State of Colorado; that at no time during his imprisonment was he accused of the commission of a crime, by complaint under oath lodged in any court of competent jurisdiction; that he was prevented from having access to the courts, and from the privilege of demanding in any court the nature of the cause of the accusation under which he was held. He asks damages.

To this declaration the defendants have filed demurrer, for that, because: (1) This court has no jurisdiction of the action; (2) The declaration does not state facts sufficient to constitute a cause of action against the defendants, or either of them; (3) That the matters in controversy herein are *res adjudicata*, and in aid thereof the demurrants crave oyer of the record and opinion of the Supreme Court of this state in the *habeas corpus* proceeding above referred to.

On argument of the demurrer it was agreed that the proceedings of the Supreme Court of Colorado in the *habeas corpus* case should be considered on the issue raised by the demurrer.

Record in *habeas corpus* case: The petition for the original writ
of *habeas corpus*, filed in the Supreme Court of Colorado on
124 April 15, 1904, sets forth a proclamation issued by the defendant, James H. Peabody, as governor, on March 23, 1904, wherein it is proclaimed and declared that the county of San Miguel in the State of Colorado, is in a state of insurrection and rebellion, by reason of the fact, as therein recited, that armed bodies of men, both within and without said county, acting in conjunction, and about to unite, had threatened violence to the citizens of said county, and destruction of property. It further appears from the petition that said governor, on the day of issuing said proclamation, by written order, directed the defendant Bell, as adjutant general, to

order out such troops as, in his judgment, necessary, and to report forthwith to the sheriff of said San Miguel County, and that he use such means as may be necessary, acting either in conjunction with or independent of the civil authorities, to restore peace and good order in said community, and to enforce obedience to the constitution and laws of the state. It is then alleged that about three hundred men, constituting a portion of the national guard, proceeded to occupy the city of Telluride.

The return to the writ of *habeas corpus* appears to have been filed on April 21, 1904. The adjutant general therein asserted that the insurrection and rebellion was at that time flagrant in San Miguel County; that ever since the national guard had reached Telluride, it had been active in the attempt to suppress said state of in-
125 surrection, and to restore peace and good order in said county, and that it had acted independently of the civil authorities because said authorities were found to be wholly powerless to render any aid whatsoever in that behalf; that after arriving at Telluride, said adjutant general had good reason to believe, and did believe in good faith, and upon due inquiry in the premises became personally and officially fully satisfied and convinced that the petitioner, Charles H. Moyer, (plaintiff here). had been, and if discharged from arrest would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion, and that he was a prominent leader of bands of lawless men engaged in the acts of insurrection and crimes mentioned in the governor's proclamation, and that in order to accomplish the suppression of said state of insurrection it was necessary, in the judgment of the governor and the adjutant general, to arrest, detain, and for some time to come, restrain the body of the said Charles H. Moyer, and that said Moyer was restrained solely for that purpose, and that he would be released from custody as soon as the same could safely be done, with reference to the suppression of the existing insurrection and rebellion.

Governor Peabody was permitted to interpose and file a confirmation of the facts set forth in the return of the adjutant general, and in addition thereto he disclosed to the Supreme Court a com-
126 munication addressed to him as governor, of date March 23, 1904, signed by county officials, including the sheriff of San Miguel County, city officials and a number of private citizens, wherein they represented to the governor that a reign of riot and lawlessness was at that time imminent; that the mob was then arming itself and that the persons who were in charge of said mob were the same persons who had theretofore within said county committed numerous acts of violence, some of which had resulted in murder and destruction of property; that the civil authorities were unable to suppress the same and provide safety to persons and property in said county; that great loss of life and sacrifice of property would likely result unless immediate and decisive action be taken, through the military authorities, to suppress it.

The petitioner filed a reply to the return to the writ in which he denied that a state of insurrection, or rebellion, existed in San

Miguel County on March 23rd, or at any other time, but he alleged that shortly before that time a certain organization, called the Citizens' Alliance, was perfected for the purpose of controlling the miners of that county, and that shortly before said March 23rd, they organized a mob and deported about seventy men who had theretofore been miners; that these miners announced their intention of returning, and that they would resist any further interference with their persons or any attempts to re-deport them; that those
127 who signed the petition to the governor aided in deporting said miners; that said acts were a part of a conspiracy entered into by the members of the Citizens' Alliance, as against the miners; denied that plaintiff took any part in fomenting said trouble; alleged that he was the then president of the Western Federation of Miners, and that he discountenanced all acts of lawlessness on the part of those belonging to said federation, and that said federation was a law-abiding, peaceable, conservative and law loving organization, existing for the purpose of bettering the social and financial condition of its members; that the civil authorities were amply able to deal with the situation.

The Colorado statutes (Ses. L. 1897 p. 204) empower and direct the governor to use the national guard to repel or suppress an invasion or insurrection when made or threatened, and the act further provides for calling out the guard for that purpose, and the mode of putting it in operation.

Opinion.

There is nothing on the face of the above provisions of the Colorado Constitution which brings it in conflict with the Fourteenth Article of Amendment to the Constitution of the United States, and the complaint here may be said to be against the manner of enforcing said provisions. It is true that if state officers, in the exer-
cise of their official authority, deny to any citizen the guar-
128 anties found in said Amendment, it is the state itself which does it, and such acts, therefore, come within the constitutional prohibition. *Ex parte* Virginia, 100 U. S. 313; Railway Co. *v.* Chicago, 166 U. S. 226; Reagan *v.* Trust Co., 154 U. S. 390. The officer, however, must claim to act under authority conferred upon him by the statute, and be guilty of an abuse of power, if the legislative act is not subject to the criticism.

It is obvious that the provisions above quoted from the Constitution of Colorado are but the enunciation of a sovereign power, a power founded on necessity and inherent in every government. It is sometimes likened to that of self defense. "The life of governments is like that of man; the latter has a right to kill, in case of natural defense; the former have the right to wage war for their own preservation." It is the declaration of the right of self preservation and finds recognition in every constitution, both national and state. It is properly invoked in all governments to repel invasion by foes without, and to suppress rebellion or insurrection by enemies or powerful disturbers of the peace within. Unless this

right and power exist, peace, good order, security—government itself—may be destroyed and obliterated by internal strife and lawlessness, when the domination of the mob becomes so powerful that it cannot be stayed by the civil authorities. This power in the state was recognized by the National Government on receiving the
129 state into the Union with the above provisions in its constitution. The provision in Sec. 4 of Art. 4 of the U. S. Constitution guarantees every state against domestic violence. The National Government possesses the same right and power, as declared in Sec. 8 of Art. 1 of its constitution.

These fundamental principles were not seriously questioned on argument, but the contention was that the plaintiff has a right to go to the country on the issue of fact: *Did insurrection exist?*

I. Judicial tribunals presuppose the existence of a civil state, hence governmental integrity is, *ex necessitate*, a political question and not a judicial one. This principle was recognized and announced in Phillips *v.* Hatch, 1 Dillon C. C. (Federal case No. 11,094) 571.

In U. S. *v.* One Hundred and Twenty-nine Packages, (Federal case No. 15,941) Judge Treat, in discussing the respective powers of the executive and judicial departments of the government in treating with and suppressing insurrection, said: "The condition of peace or war, public or civil, in a legal, sense, must be determined by the political department, not the judicial. The latter is bo-nd by the decision thus made. * * * The same doctrine has been uniformly maintained from the commencement of the government. The absurdity of any other rule is manifest. If, during the
130 actual clash of arms, courts were rightfully hearing evidence as to the fact of war, either with or without the aid of juries determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerent would be likely to yield to the decision; and in case of insurrection, the insurgents already in arms against the constitution and laws, would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased—that is, when peace is restored. In a legal sense, the state of war or peace is not a question *in pais* for courts to determine. It is a legal fact ascertainable only from the decision of the political department."

In Kelly *v.* Sanders, 99 U. S. 441, Mr. Justice Strong, in delivering the opinion of the court said, at page 446: "Further than this, whether the military authority had been established in Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government, and not by the courts. In its nature it
131 was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers."

In the noted case of Luther *v.* Borden, 7 How. 1, Mr. Justice

Taney, after adverting to the principle that it is not a judicial but an executive function to determine when an insurrection exists, added: "Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful."

In re William Boyle, 57 Pac. Rep. (Idaho) 706, (45 L. R. A. 832, it was held: "On application for writ of *habeas corpus*, the truth of the recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion, will not be inquired into or reviewed."

I therefore conclude that the existence of insurrection, as declared in the governor's proclamation, is not issuable.

2. Further, the plaintiff insists that he has a right to take the verdict of a jury on the issue of fact: *Was the plaintiff's arrest and detention necessary in suppressing the insurrection?*

It would seem to be in keeping with principle to hold the
132 defendants responsible by civil action for a wanton abuse of power. In Luther *v.* Borden, *supra*, it is said: "No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable." But the Chief Justice there declared further: "And unquestionably the state may use its military power to put down an insurrection, too strong to be controlled by the civil authorities. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the governor of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. *And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable ground to believe was engaged in the in-*
surrection." So that, the plaintiff's arrest and detention was
133 not dependent on his actual participation in the insurrection; and neither the governor nor the military officers would be liable civilly for an unintentional error. Reasonable inquiry and care on their part under the circumstances as they then existed ought to relieve them from civil responsibility. The state constitution enjoined the governor, as such officer, to put down the insurrection. The situation must have been more or less desperate and required prompt action, effective of the purpose. Measures are sometimes necessary under the police power, that are severe, such as the sum-

mary destruction of property used for an unlawful purpose. (Lawton *v.* Steele, 152 U. S. 133); such as treating property used in an unlawful traffic as a nuisance, (Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1); such as the summary destruction of property to stay conflagration, (Bowditch *v.* Boston, 101 U. S. 16); such as the summary destruction of obscene books and diseased cattle (Sentell *v.* R. R. Co. 166 U. S. 698); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion, (Campagnie Francaise etc. *v.* Board, 186 U. S. 380), and the prohibitions found in the Fourteenth Amendment have never been construed to be an encroachment on such a proper exercise of that power; neither is it believed that said prohibitions can be so construed as an encroachment upon the exercise of the military power within the lines here indicated—
134 invoked to protect the very life of the social body. In both cases we find their right and justification in the maxim *salus populi, suprema lex.*

Looking to the facts it appears clear that the complaint here is not against an abuse of power, but the exercise of power. It is alleged that the plaintiff was arrested without warrant issued on a written charge against him—that he was not taken into court. The very principle announced in the state constitution is challenged in practical effectiveness by the declaration. The existence of the insurrection itself is denied. The right and power to use the necessary means to put it down is disputed; and beside this the reply to the return to the writ of *habeas corpus* gave some color to the reasonableness of the belief that the arrest of the plaintiff was not an abuse of power, for it is therein said that he was president of the Western Federation of Miners, whose members had been deported from San Miguel County, and who intended to return, and whose return would likely be forcibly resisted. This condition alone threatened riot and bloodshed. On one side was a body of determined men of whom the plaintiff was the official head, and whose counsel and advice under the circumstances had been most likely taken. It may likewise be said that it would have also been the duty of those in authority of the military forces to have taken into custody those who occupied
135 the position of leaders, if any, on the other side of the conflict. And beyond this, the proceedings in *habeas corpus* presented to the Supreme Court the then situation in San Miguel County, and the reason for the arrest and detention of the plaintiff up to that time. These facts under the issues were weighed and considered by that court in the light of the constitutional provision and the principles of law controlling in such emergencies. The prisoner was remanded to the custody of the defendants. This was done, and could only have been done, on the conclusion that his arrest and detention were reasonable and proper means in the suppression of the insurrection. In rendering its opinion that court, among other things, said: "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence, until order is restored, would lead to the most absurd results. * * * His arrest and detention in such circumstances are merely to prevent him

from taking part, or aiding in a continuation of the conditions which the governor, in the discharge of his official duties, and in the exercise of the authority conferred by law, is endeavoring to suppress," *In re* Moyer, 85 Pac. 190.

My learned predecessor, Judge Hallett, refused to discharge one Sherman Parker, on a like application, while he was held by the military authorities during the same unfortunate period in the state's history, and in discharging the writ in that case, he justified the
arrest and detention of the prisoner as a proper means of
136 suppressing the insurrection.

It follows that the facts disclosed do not show an abuse of power on the part of the defendants, and, hence, there was no violation of the prohibitions found in the Fourteenth Amendment. It results that this court has not jurisdiction. The demurrer ought to be sustained. It is so ordered.

ROBT. E. LEWIS, *Judge.*

Be it further remembered that on Tuesday, the 4th day of December, A. D. 1906, the plaintiff, by his counsel, gave notice in open court that he would elect to stand upon his said amended complaint. Whereupon the defndants moved for judgment, which was accordingly granted, and it was then and there ordered, adjudged and decreed that the plaintiff take nothing by virtue of his amended bill of complaint, and that the defendants go hence hereof without day, and that a final judgment for costs be rendered herein in favor of the defendants, and against the plaintiff, to which said orders and final judgment the plaintiff, by his counsel, then and there asked and was allowed an exception.

And, inasmuch as the foregoing matters and things do not fully appear of record herein, the plaintiff tenders this his bill of exceptions within the time allowed, and asks that the same may be signed,
sealed and allowed as such bill of exceptions, and made a
137 part of the record herein, which is accordingly done on this 2nd day of January, A. D. 1907.

ROBT. E. LEWIS, *Judge.*

(Endorsed:) No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer *versus* James H. Peabody, Sherman M. Bell and Bulkeley Wells. Bill of Exceptions. Filed Jan. 2, 1907, Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the United States Circuit Court.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

I, Robert E. Lewis, District Judge of the United States in and for the District of Colorado, do hereby certify that I sat in the Circuit Court of the United States, and disposed of the demurrer of the defendants to the amended bill of complaint in said cause. That I sustained the said demurrer solely upon the ground that there was no jurisdiction in the Circuit Court of the United States to en-
138 tertain the plaintiff's said amended complaint; and I did dismiss the said amended complaint and the said suit, and did enter judgment against the plaintiff and in favor of the defendants for costs, solely by reason of the fact that the said Circuit Court of the United States was and is, in my opinion, without jurisdiction to entertain, hear or determine the matters set up in said amended complaint.

In witness whereof, I have hereunto set my hand and seal this 2nd day of January, A. D. 1907.

ROBT. E. LEWIS, *Judge.* [SEAL.]

(Endorsed:) No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer *versus* James H. Peabody, Sherman M. Bell and Bulkeley Wells. Certificate as to Jurisdiction. Filed Jan. 2, 1907, Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the United States Circuit Court.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

139 To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

Comes now the above named plaintiff, by his attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said United States Circuit Court, sitting in and for the District of Colorado at the November Term thereof, A. D. 1906, on the 4th day of December, A. D. 1906, manifest error hath happened to the great

damage of said plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore Said Plaintiff Prays:

For the allowance of a writ of error and for an order fixing the amount of bond upon the allowance of said writ, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States, and that the papers in said cause, duly authenticated, may be sent to the said, the United States Supreme Court.

Dated this — day of ——, A. D. 190–.

E. F. RICHARDSON,
H. N. HAWKINS,
Attorneys for Plaintiff.

Allowed:
ROBT. E. LEWIS, *Judge.*

140 (Endorsed:) No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer *versus* James H. Peabody, Sherman M. Bell and Bulkeley Wells. Petition for Writ of Error to U. S. Supreme Court. Filed Jan. 19, 1907, Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for Plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the United States Circuit Court.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS, Defendants.

Assignment of Errors.

Comes now the plaintiff in the above entitled cause, and makes the following assignment of errors, which he avers occurred upon the trial of this cause and in the record and proceedings therein:

I.

The court erred in sustaining the demurrer of the defendants to the amended complaint of the plaintiff against exception saved and allowed.

II.

141 The court erred in dismissing the plaintiff's amended complaint against exception saved and allowed.

III.

The court erred in dismissing plaintiff's suit against exception saved and allowed.

IV.

The court erred in rendering final judgment for costs in favor of the defendants and against the plaintiff against exception saved and allowed.

Wherefore, The Plaintiff Prays:

That the judgment herein of the Circuit Court of the United States for the District of Colorado be reversed, set aside and for naught held.

E. F. RICHARDSON,
H. N. HAWKINS,
Attorneys for Plaintiff.

(Endorsed:) No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer *versus* James H. Peabody, Sherman M. Bell, and Bulkeley Wells. Assignment of Errors. Filed Jan. 19, 1907, Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for Plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

142 Know all men by these presents, That we, Charles H. Moyer as principal, and O. N. Hilton, W. F. Hynes, as sureties, are held and firmly bound unto James H. Peabody, Sherman Bell and Bulkeley Wells in the full and just sum of five hundred dollars, to be paid to the said James H. Peabody, Sherman Bell and —— —— their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of December in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a term of the Circuit Court of the United States in and for the District of Colorado in a suit depending in said court, between Charles H. Moyer as plaintiff and James H. Peabody, Sherman Bell and Bulkeley Wells as defendants, a judgment was rendered against the said Charles H. Moyer and the said Charles H. Moyer having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Peabody, Sherman Bell and Bulkeley Wells citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Charles H. Moyer shall prosecute said writ to effect,
143 and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES H. MOYER. [SEAL.]
O. N. HILTON. [SEAL.]
W. F. HYNES. [SEAL.]

Sealed and delivered in the presence of
—— ——.

Approved by
ROBT. E. LEWIS,
District Judge.

Justification.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

O. N. Hilton and W. F. Hynes, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate and personal property the sum below set opposite his name, that is to say:

As to O. N. Hilton five hundred dollars
As to W. F. Hynes five hundred dollars

over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

O. N. HILTON.
W. F. HYNES.

Subscribed and sworn to before me at Denver this 18th
144 day of January, A. D. 1907.

[Seal U. S. Circuit Court.]

CHARLES W. BISHOP,
Clerk U. S. Circuit Court, District of Colorado.

(Endorsed:) 4707. Charles H. Moyer *vs.* James H. Peabody *et al.* Bond on Writ of Error. Filed Jan. 19, 1907, Charles W. Bishop, Clerk.

Fifty-ninth Day, November Term, Saturday, January 19th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

4707.

CHARLES H. MOYER
vs.
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

Action for Damages.

Now on this 19th day of January, A. D. 1907, the plaintiff by his attorneys has filed herein and presents to the court his petition, praying for the allowance for a writ of error to the supreme court of the United States, together with an assignment of errors intended to be urged by the said plaintiff, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the supreme court of the United States, and that such other and further proceedings may be had as may be proper in the premises. Now,

therefore, in consideration thereof, the court does hereby
145 allow the writ of error prayed for by the plaintiff herein, upon the filing of a good and sufficient bond with surety, to be approved by the acting judge of this court, in the sum of five hundred dollars.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the United States for the District of Colorado.

No. 4707.

CHARLES H. MOYER
versus
JAMES H. PEABODY, SHERMAN M. BELL, and BULKELEY WELLS.

The Clerk will prepare in the above entitled cause, for the Supreme Court of the United States, a complete transcript of the record, bill of exceptions, assignment of errors, and all other papers, exhibits and proceedings.

RICHARDSON & HAWKINS,
Attorneys for Charles H. Moyer.

To Charles W. Bishop, Clerk.

Denver, Colorado, January 19th, 1907.

(Endorsed:) No. 4707. United States Circuit Court for the District of Colorado. Charles H. Moyer *versus* James H. Peabody *et al.* Præcipe for transcript. Filed Jan. 19, 1907, Charles W. Bishop, Clerk.

146 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States sitting in and for the District of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said U. S. Circuit Court before you, between Charles H. Moyer as plaintiff and James H. Peabody, Sherman M. Bell and Bulkeley Wells as defendants a manifest error hath happened, to the great damage of the said Charles H. Moyer as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of January, in the year of our Lord one thousand nine hundred and seven.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States in and for the District of Colorado.

Allowed by
ROB'T E. LEWIS,
District Judge.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado, ss:*

In obedience to the command of the within writ, I herewith transmit to the Honorable The Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court, for the district of Colorado at the city and county of Denver in said district, this twenty-ninth day of January, A. D. 1907.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

147 [Endorsed:] No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer, *versus* James H. Peabody, Sherman M. Bell and Bulkeley Wells. Writ of Error. Filed Jan. 19 1907. Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

148 UNITED STATES OF AMERICA, *ss:*

The President of the United States to James H. Peabody, Sherman M. Bell, and Bulkeley Wells, and John M. Waldron, their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, held at the City of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Colorado, wherein Charles H. Moyer is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said

writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 19th day of January, A. D. 1907, and of the independence of the United States 131st.

[Seal United States Circuit Court, District of Colorado.]

ROB'T E. LEWIS,
United States District Judge, Presiding in the Circuit Court.

Attest:
CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States in and for the District of Colorado.

149 UNITED STATES OF AMERICA, *District of Colorado, ss:*

I hereby admit service of the within citation for the said defendants in error therein mentioned, to-wit: James H. Peabody, Sherman M. Bell and Bulkeley Wells, by receiving for them and each of them a true copy of said citation.

WILLIAM H. DICKSON,
Attorney General of Colorado, Attorney for the Defendants in Error, James H. Peabody, Sherman M. Bell, and Bulkeley Wells.

150 [Endorsed:] No. 4707. United States of America, District of Colorado, *ss.* In the United States Circuit Court. Charles H. Moyer, *versus* James H. Peabody, Sherman M. Bell and Bulkeley Wells. Citation and Service. Filed Jan. 19 1907. Charles W. Bishop, Clerk. Richardson & Hawkins, Attorneys for plaintiff, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

151 UNITED STATES OF AMERICA, *District of Colorado, ss:*

I, Charles W. Bishop, clerk of the circuit court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and forty-five (145) both inclusive, to be a true, perfect, and complete copy of the pleadings, bill of exceptions, assignments of error, bond on writ of error, and all proceedings in the case, as set forth in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed and entered of record in said court and in a certain case lately in said court pending wherein Charles H. Moyer was plaintiff and James H. Peabody, Sherman M. Bell, and Bulkeley Wells were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith, a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver in said district, this 29th day of January, A. D. 1907.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

152 In the Circuit Court of the United States for the District of Colorado.

No. 4707.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY ET AL., Defendants.

Judge's Memorandum.

This cause is before the Court upon a motion to dismiss, filed by the Attorney General. The motion sets out the following grounds: First,—Because the said complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them. Second,—That said complaint does not affirmatively show that this Court has jurisdiction of the subject matter of this action within the meaning of Section 1979 of the Revised Statutes of the United States, for the reason that said complaint does not specifically set forth the statute, regulation, custom or usage in the state of Colorado by which the plaintiff has been subjected to the deprivation of any right, privilege, or immunity secured to him by the Constitution and laws of the United States, and Third,—Because said complaint does not state facts which involve any federal question to be determined by this court.

The Code of Colorado provides that the defendant may demur to the complaint within the time required in the summons to
153 answer when it appears on the face thereof, either (1st) that the Court has no jurisdiction of the person of the defendant or the subject of the action; or (2nd) That the plaintiff has no legal capacity to sue; or (3rd) That there is another action pending between the same parties for the same cause; or (4th) That there is a defect or misjoin-er of parties, plaintiff or defendant; or (5th) That several causes of action have been improperly united; or (6th) That the complaint does not state facts sufficient to constitute a cause of action; or (7th) That the complaint is ambiguous, unintelligible or uncertain.

Section 914 of the Revised Statutes of the United States provides, the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity or admiralty causes, in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which said Circuit or District Courts are held.

The formal pleadings, under the code, are the complaint, demurrer or replication on the part of the plaintiff and the demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint, on behalf of the defendant.

It will be noticed that two grounds set out in the motion
154 are made grounds of demurrer under the code: (1st) That the complaint does not state facts sufficient to constitute a cause of action; (2nd) that the Court had no jurisdiction. The other ground is perhaps subject to a motion to make more specific and certain. The office of a motion generally, is to bring to the notice of the Court some matter or subject in the progress of a case, which cannot be raised by one of the formal pleadings authoried by the code. Notwithstanding, the offer of plaintiff's counsel to have this motion treated as a demurrer, the court is of opinion that it is better to proceed in the orderly method provided by the code and that this motion ought not to be permitted to usurp the place of regular formal pleadings where they are appropriate. The rights of the parties, in the opinion of the court, will be better preserved if a loose, irregular and unauthorized practice is not tolerated. If the complaint does not state facts sufficient to constitute a cause of action, or the court is without jurisdiction, the appointed mode of submitting these questions to the court, under the Colorado, code, is by a demurrer and not by a motion to dismiss. Without deciding anything else in this case, the Court is of opinion, for the reasons just stated, that this motion should be overruled, and it is so ordered. The defendants may take ten days within which to demur or answer.

(Endorsed:) 4707. Charles H. Moyer *vs.* James H. Pea-
155 body, *et al.* Judge's Memorandum on Motion to Dismiss. Filed Nov. 7, 1905. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

In the Circuit Court of the United States within and for the District of Colorado.

No. 4707.

CHARLES H. MOYER, Plaintiff,
vs.
JAMES H. PEABODY, SHERMAN BELL, and BULKELEY WELLS, Defendants.

Statement of Facts.

The plaintiff alleges in the declaration that he is a citizen of the United States, and a citizen and resident of the State of Colorado; that the defendants also are citizens of the United States, and citizens and residents of the State of Colorado; that he "brings this action in this court against said defendants under the Constitution of the United States, and under Sec. 1979 of the Revised Statutes of the

United States by reason of the fact. as will more fully appear hereinafter in this complaint, that the defendants under color of the Constitution of Colorado, and the laws thereof, subjected this plaintiff to the deprivation of rights, privileges and immunities secured to him by the constitution and laws of the United States;"
156 that the defendant, Peabody, was elected governor of said state in November, 1902, for a term of two years, beginning January 13, 1903; that the defendant, Bell, was appointed Adjutant General of the National Guard of the State of Colorado, and the defendant, Wells, was appointed Captian of a company in said guard, by the defendant Peabody, as governor; that the defendant Peabody, as commander-in-chief of the said militia, and the defendant Bell, as adjutant general, directed and caused a portion of the said national guard of Colorado to assemble in the City of Telluride, San Miguel County, Colorado; that while so assembled, said guard was under the direction, orders and control of the defendant Peabody, as commander-in-chief, and the defendant Bell, as adjutant general, and the defendant Wells, as captain; that on March 30, 1904, the defendants, acting as officers of said national guard, gave directions to, and caused a squad of men, being a part of said national guard, to arrest the plaintiff and imprison him in the city jail in the town of Telluride; that the plaintiff was confined and kept, forcibly and against his will, from March 30, 1904, until June 15, 1904, and with force and arms was restrained of his liberty and subjected to hardships, privations, humiliation and disgrace; that the defendants claimed the right to arrest and detain the plaintiff by virtue of their being officers of the State of Colorado, and under the laws of
157 Colorado, to-wit Sec. 2 of Art. 4 of the Constitution of Colorado, which is as follows: "The Supreme executive power of the state shall be vested in the governor, who shall take care that the laws shall be faithfully executed." And Sec. 5 of Art. 4 of said constitution, as follows: "The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, suppress insurrection and repel invasion;" that defendants claimed other statutes of Colorado gave them also the right to arrest, imprison and detain the plaintiff, but that plaintiff is unable to find said statute; that after the arrest and detention of the plaintiff by the defendants, he made application to the Supreme Court of the State of Colorado, the highest court and court of last resort in said state, for a writ of *habeas corpus*, in which application the plaintiff asserted that he was deprived of his liberty contrary to the laws of the State of Colorado, and of the laws of the United States, and said court allowed the writ to issue. That in their return to said writ, Peabody, Bell and Wells did not claim that the courts of said state, or in any part of said state, were overthrown, and that a trial could not be had to determine any charge of crime made against the plaintiff; that Adjutant
158 General Bell, in his return to the writ, asserted that he was the adjutant general of the national guard of Colorado; that the governor of Colorado had given him orders to arrest and detain

the plaintiff, and not to release him under any circumstances until further orders from the governor; that the said Wells was at the time a subordinate military officer under the direct command of said Bell, and the defendant Peabody certified to the correctness of said statement in Bell's return to the writ; and the said Peabody also stated that he was acting in his official capacity under the laws of Colorado relating to the arrest, detention and imprisonment of the said Moyer; that the Supreme Court of the State of Colorado refused to admit Moyer to bail, and finally rendered a judgment in said *habeas corpus* proceedings to the effect that the governor of the state, and the other respondents therein might, as officers of the State of Colorado, under the authority vested in them under the constitution and the sections above quoted, and the statutes of said State, hold and detain said Moyer until, in their judgment, they saw fit to release him; that this was deprivation of liberty without due process of law; that by the acts and decisions of said Supreme Court, plaintiff cannot obtain in the courts of Colorado any redress for the wrongs so inflicted upon him; that said decision is contrary to the provision of the constitution and the laws of the United
159 States relative to personal rights; that the arrest and imprisonment of the plaintiff was without probable cause and without legal process or color thereof, and not in due course of law; that the conduct of the defendants was in disregard of the rights of the plaintiff, guaranteed to him by the constitution and the laws of the United States; that the plaintiff, was a law-abiding citizen; that he was not a member of the national guard of the State of Colorado; that at no time during his imprisonment was he accused of the commission of a crime, by complaint under oath lodged in any court of competent jurisdiction that he was prevented from having access to the courts, and from the privileges of demanding in any court the nature of the cause of the accusation under which he was held. He asks damages.

To this declaration the defendants have filed demurrer, for that, because (1) This court has no jurisdiction of the action; (2) The declaration does not state facts sufficient to constitute a cause of action against the defendants, or either of them; (3) That the matters in controversy herein are *res adjudicata;* and in aid thereof the demurrants crave oyer of the record and opinion of the Supreme Court of this State in the *habeas corpus* proceeding above referred to.

On argument of the demurrer it was agreed that the proceedings of the Supreme Court of Colorado in the *habeas corpus* case
160 should be considered on the issue raised by the demurrer.

Record in *habeas corpus* case; The petition for the original writ of *habeas corpus*, filed in the Supreme Court of Colorado on April 15, 1904, sets forth a proclamation issued by the defendant, James H. Peabody, as governor, on March 23, 1904, wherein it is proclaimed and declared that the county of San Miguel in the state of Colorado, is in a state of insurrection and rebellion, by reason of the fact, as therein recited, that armed bodies of men, both within and without said county, acting in conjunction, and about to unite had threatened violence to the citizens of said county, and destruction

of property. It further appears from the petition that said governor, on the day of issuing said proclamation, by written order, directed the defendant Bell, as adjutant general, to order out such troops as, in his judgment, necessary, and to report forthwith to the sheriff of said San Miguel County, and that he use such means as may be necessary, acting either in conjunction with or independent of the civil authorities, to restore peace and good order in said community, and to enforce obedience to the constitution and laws of the state. It is then alleged that about three hundred men, constituting a portion of the national guard, proceeded to occupy the city of Telluride.

The return to the writ of *habeas corpus* appears to have been filed on April 21, 1904. The adjutant general therein asserted
161 that the insurrection and rebellion was at that time flagrant in San Miguel County; that ever since the national guard had reached Telluride, it had been active in the attempt to suppress said state of insurrection, and to restore peace and good order in said county, and that it had acted independently of the civil authorities because said authorities were found to be wholly powerless to render any aid whatsoever in that behalf; that after arriving at Telluride, said adjutant general had good reason to believe, and did believe in good faith, and upon due inquiry in the premises became personally and officially fully satisfied and convinced that the petitioner Charles H. Moyer, (plaintiff here) had been, and if discharged from arrest would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion, and that he was a prominent leader of bands of lawless men engaged in the acts of insurrection and crimes mentioned in the governor's proclamation, and that in order to accomplish the suppression of said state of insurrection it was necessary in the judgment of the governor and the adjutant general, to arrest, detain, and for some time to come, restrain the body of the said Charles H. Moyer, and that said Moyer was restrained solely for that purpose, and that he would be released from custody as soon as the same could safely be done, with reference to the suppression of the existing insurrection and rebellion.

162 Governor Peabody was permitted to interpose and file a confirmation of the facts set forth in the return of the adjutant general, and in addition thereto he disclosed to the Supreme Court a communication addressed to him as governor, of date March 23, 1904, signed by county officials, including the sheriff of San Miguel County, city officials and a number of private citizens, wherein they represented to the governor that a reign of riot and lawlessness was at that time imminent; that the mob was then arming itself and that the persons who were in charge of said mob were the same persons who had theretofore within said county committed numerous acts of violence, some of which had resulted in murder and destruction of property; that the civil authorities were unable to suppress the same and provide safety to persons and property in said county; that great loss of life and sacrifice of property would likely result unless immediate and decisive action be taken, through the military authorities, to suppress it.

The petitioner filed a reply to the return to the writ in which he denied that a state of insurrection, or rebellion, existed in San Miguel County on March 23rd, or at any other time, but he alleged that shortly before that time a certain organization, called the Citizens' Alliance, was perfected for the purpose of controlling the
163 miners of that county, and that shortly before said March 23rd, they organized a mob and deported about seventy men who had theretofore been miners; that these miners announced their intention of returning, and that they would resist any further interference with their persons or any attempts to re-deport them; that those who signed the petition to the governor aided in deporting said miners; that said acts were a part of a conspiracy entered into by the members of the Citizens' Alliance, as against the miners, denied that plaintiff took any part in fomenting said troubles; alleged that he was the then president of the Western Federation of Miners, and that he discountenanced all acts of lawlessness on the part of those belonging to said federation, and that said federation was a law-abiding, peaceable, conservative and law loving organization, existing for the purpose of bettering the social and financial condition of its members; that the civil authorities were amply able to deal with the situation.

The Colorado statutes (Ses. L. 1897 p. 204) empower and direct the governor to use the national guard to repel or suppress an invasion or insurrection when made or threatened, and the act further provides for calling out the guard for that purpose, and the mode of putting it in operation.

Opinion.

There is nothing on the face of the above provisions of the
164 Colorado Constitution which brings it in conflict with the Fourteenth Article of Amendment to the Constitution of the United States, and the complaint here may be said to be against the manner of enforcing said provisions. It is true that if state officers, in the exercise of their official authority, deny to any citizen the guaranties found in said Amendment, it is the state itself which does it, and such acts, therefore, come within the constitutional prohibitions. *Ex parte* Virginia, 100 U. S. 313; Railway Co. *v.* Chicago, 166 U. S. 226; Reagan *v.* Trust Co., 154, U. S., 390. The officer, however, must claim to act under authority conferred upon him by the statute, and be guilty of an abuse of power, if the legislative act is not subject to the criticism.

It is obvious that the provisions above quoted from the Constitution of Colorado are but the enunciation of a sovereign power, a power founded on necessity and inherent in every government. It is sometimes likened to that of self defense. "The life of governments is like that of man; the latter has a right to kill, in case of natural defense; the former have the right to wage war for their own preservation." It is the declaration of the right of self preservation and finds recognition in every constitution, both national and
165 state. It is properly invoked in all governments to repel invasion by foes without, and to suppress rebellion or insurrec-

tion by enemies or powerful disturbers of the peace within. Unless this right and power exist, peace, good order, security—government itself—may be destroyed and obliterated by internal strife and lawlessness, when the domination of the mob becomes so powerful that it cannot be stayed by the civil authorities. This power in the state was recognized by the National Government on receiving the state into the Union with the above provisions in its constitution. The provision in Sec. 4 of Art. 4 of the U. S. Constitution guarantees every state against domestic violence. The National Government possesses the same right and power, as declared in Sec. 8 of Art. 1 of its constitution.

These fundamental principles were not seriously questioned on argument, but the contention was that the plaintiff has a right to go to the country on the issue of fact: *Did insurrection exist?*

1. Judicial tribunals presuppose the existence of a civil state, hence governmental integrity is, *ex necessitate*, a political question and not a judicial one. This principle was recognized and announced in Phillips *v.* Hatch, 1 Dillon C. C. (Federal case No. 11,094) 571.

In U. S. *v.* One Hundred and twenty-nine Packages, (Fed-
166 eral case No. 15,941) Judge Treat, in discussing the respective powers of the executive and judicial departments of the government in treating with and suppressing insurrection, said: The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made. * * * The same doctrine has been uniformly maintained from the commencement of the government. The absurdity of any other rule is manifest. If, during the actual clash of arms, courts were rightfully hearing evidence as to the fact of war, either with or without the aid of juries determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerant would be likely to yield to the decision; and in case of insurrection, the insurgents already in arms against the constitution and laws, would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased—that is, when peace is restored. In a legal sense, the state of war or peace is not a question *in pais* for courts to determine. It is a legal fact ascertainable only from the decision of the political department.

In Keely *vs.* Sanders, 99 U. S. 441, Mr. Justice Strong, in delivering the opinion of the court said, at page 446:

Further than this, whether the military authority had been established in Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered

by the executive branch of the government, and not by the
167 courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers.

In the noted case of Luther *vs.* Borden, 7 How. 1, Mr. Justice Taney, after adverting to the principle that it is not a judicial but an executive function to determine when an insurrection exists, added:

Yet if this right does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

In re William Boyle, 57 Pac. Rep. (Idaho) 706, (45 L. R. A. 832) it was held:

On application for writ of *habeas corpus,* the truth of the recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion, will not be inquired into or reviewed.

I therefore conclude that the existence of insurrection, as declared in the governor's proclamation, is not issuable.

2. Further, the plaintiff insists that he has a right to take the verdict of a jury on the issue of fact: *Was the plaintiff's arrest and detention necessary in suppressing the insurrection?*

It would seem to be in keeping with principle to hold
168 the defendants responsible by civil action for a wanton abuse of power. In Luther *vs.* Borden, *supra,* it is said:

No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

But the Chief Justice there declared further:

And unquestionably the state may use its military power to put down an insurrection, too strong to be controlled by the civil authorities. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine, what degree of force the crisis demands, and if the governor of Rhode Island deemed the armed opposition so formidable and so ramified throughout the state, as to require the use of its military, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. *And in that state of things the officers engaged in its military service might lawfully arrest anyone, who, from the information before them, they had reasonable ground to believe was engaged in the insurrection.*

So that, the plaintiff's arrest and detention was not dependent on

his actual participation in the insurrection; and neither the governor nor the military officers would be liable civilly for an unintentional error. Reasonable inquiry and care on their part under the
169 circumstances as they then existed ought to relieve them from civil responsibilty. The state constitution enjoined the governor, as such officer, to put down the insurrection. The situation must have been more or less desperate and required prompt action, effective of the purpose. Measures are sometimes necessary under the police power, that are severe; such as the summary destruction of property used for an unlawful purpose, (Lawton *vs.* Steele, 152 U. S. 133); such as treating property used in an unlawful traffic as a nuisance, (Mugler *vs.* Kansas, 123 U. S. 623; Kidd *vs.* Pearson, 128 U. S. 1); such as the summary destruction of property to stay conflagration, (Bowditch *vs.* Boston, 101 U. S. 16); such as the summary destruction of obscene books, and diseased cattle (Sentell *vs.* R. R. Co. 166 U. S. 698); such as the restraint of personal liberty in passing either into or out of an infected district for the extermination of contagion, (Campangnie Francaise etc. *vs.* Board 186 U. S. 380) and the prohibitions found in the Fourteenth Amendment have never been construed to be an encroachment on such a proper exercise of that power; neither is it believed that said prohibitions can be so construed as an encroachment upon the exercise of the military power within the lines here indicated—invoked to protect the very life of the social body. In both cases we find their right and justification in the maxim, *salus populi, suprema lex.*

170 Looking to the facts, it appears clear that the complaint here is not against an abuse of power, but the exercise of power. It is alleged that plaintiff was arrested without warrant issued on a written charge against him—that he was not taken into court. The very principle announced in the state constitution is challenged in practical effectiveness by the declaration. The existence of the insurrection itself is denied. The right and power to use the necessary means to put it down is disputed; and beside this the reply to the return to the writ of *habeas corpus* gave some color to the reasonableness of the belief that the arrest of the plaintiff was not an abuse of power, for it is therein said that he was president of the Western Federation of Miners, whose members had been deported from San Miguel County, and who intended to return, and whose return would likely be forcibly resisted. This condition alone threatened riot and bloodshed. On one side was a body of determined men of whom the plaintiff was the official head, and whose counsel and advice under the circumstances had been most likely taken. It may likewise be said that it would have also been the duty of those in authority of the military forces to have taken into custody those who occupied the position of leaders, if any, on the other side of the conflict. And beyond this, the proceedings in *habeas corpus* presented to the Supreme Court the then situation in San
171 Miguel County, and the reason for the arrest and detention of the plaintiff up to that time. These facts under the issues were weighed and considered by that court in the light of

the constitutional provision and the principles of law controlling in such emergencies. The prisoner was remanded to the custody of the defendants. This was done, and could only have been done, on the conclusion that his arrest and detention were reasonable and proper means in the suppression of the insurrection. In rendering its opinion that court, among other things, said:

To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence, until order is restored, would lead to the most absurd results. * * * His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. *In re* Moyer, 85 Pac. 190.

My learned predecessor, Judge Hallett, refused to discharge one Sherman Parker, on a like application, while he was held by the military authorities during the same unfortunate period in the state's history, and in discharging the writ in that case, he justified the arrest and detention of the prisoner as a proper means of suppressing the insurrection.

It follows that the facts disclosed do not show an abuse of power on the part of the defendants, and, hence, there was no viola-
172 tion of the prohibitions found in the Fourteenth Amendment.

It results that this court has not jurisdiction. The demurrer ought to be sustained. It is so ordered.

ROB'T E. LEWIS, *Judge.*

(Endorsed:) No. 4707. Moyer *vs.* Peabody *et al.* Opinion on sustaining demurrer. Filed Nov. 19, 1906, Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

I, Charles W. Bishop, clerk of the circuit court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one hundred and fifty two (152) to one hundred and seventy two (172), to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court, and in a certain cause lately in said court pending, wherein Charles H. Moyer was plaintiff, and James H. Peabody, Sherman M. Bell, and Bulkeley Wells were defendants, as fully and completely as the same still remain on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver in said district, this 29th day of January, A. D. 1907.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Endorsed on cover: File No. 20,651. Colorado C. C. U. S. Term No. 272. Charles H. Moyer, plaintiff in error, *vs.* James H. Peabody, Sherman M. Bell, and Bulkeley Wells. Filed April 1st, 1907. File No. 20,651.

(20,651)

In the Supreme Court of the United States.

OCTOBER TERM, 1907, No. 272.

OCTOBER TERM, 1908, No. 55.

CHARLES H. MOYER, PLAINTIFF IN ERROR,

vs.

JAMES H. PEABODY, SHERMAN M. BELL AND BULKELEY WELLS, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

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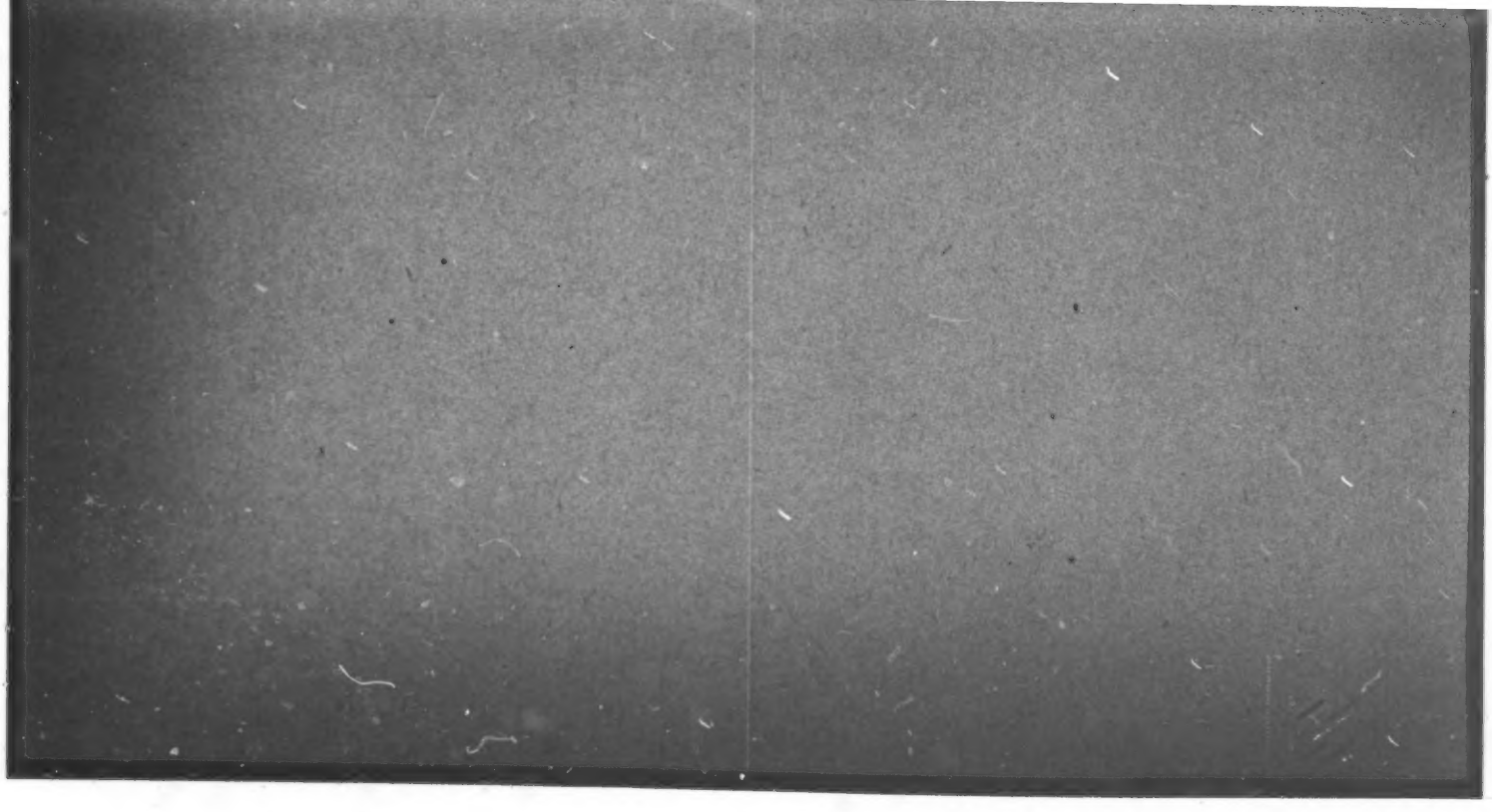

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In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The questions involved in the foregoing proceeding and the manner in which they are raised occur as follows:

On the 11th day of March, 1905, Charles H. Moyer, the plaintiff in error, filed a verified complaint in the Circuit Court of the United States for the district of Colorado, against James H. Peabody, Sherman M. Bell and Bulkeley Wells, the defendants in error. (Folio 1.)

Upon the filing of this complaint, summons was issued and served upon the defendants. (Folio 9.)

In due time a demurrer was lodged by the several defendants. (Folios 11-13.)

By stipulation, on the 10th day of May, 1905, the plaintiff in error filed his amended complaint, in which he declared (folio 15) that he was, during all of the time mentioned therein, a citizen of the United States, and a citizen and resident of the state of Colorado, and that the said defendants were likewise citizens and residents of said state. He further stated that the action was brought under the Constitution of the United States, and section 1979 of the Revised Statutes thereof, for that, the defendants, under color of the Constitution of Colorado and of the laws thereof, had subjected the plaintiff to the deprivation of certain rights, privileges and immunities secured to him by the Constitution and laws of the United States. Particularizing, he declared, that at a general election, held in the state of Colorado on the 4th day of November, 1902, (folio 16), the defendant Peabody was elected governor of said state, and qualified and entered upon the discharge of his duties on the 13th day of January, 1903, for a term of two years next ensuing. That, as such governor, he thereafter appointed the defendant Bell adjutant general of the national guard of the state, and the defendant Wells a captain of a company thereof, and that thereafter, on or about the 23d day of March, 1904, the said Peabody, as commander-in-chief of the state militia, and the said Bell as adjutant general thereof, caused a portion of the said guard to assemble in the city of Telluride, county of San Miguel, and state of Colorado, under the direction, orders and control of Peabody, as commander-in-chief, Bell as adjutant general, and Wells as captain. That on or about the 30th day of March, 1904, the said defendants, acting as officers of said guard, and as officers of the state of Colorado, gave directions to a squad of men, composing a part of said guard, to arrest the plaintiff in error and imprison him in a place commonly designated as the city jail in said town, county and state, and, pursuant to said order, the plaintiff was arrested, confined and kept forcibly and against his will (except for a short period of time during which they took him as a prisoner to other points), from about 8:05 a. m. of said 30th day of March, 1904, until the hour of about 3:45 p. m. of June 15, 1904. That during the said period the said plaintiff in error was restrained with force and arms of his liberty, and he was

subjected to hardships, privations, humiliations and disgrace, all of which was claimed to be done by the defendants by virtue of their being officers of the state of Colorado, and under the laws of Colorado, and such laws are specified in part as being section 2 of article IV of the Constitution of Colorado, which asserts that

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws shall be faithfully executed,"

and section 5 of article IV of said Constitution, which provides that

"The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute laws, suppress insurrection and repel invasion."

The plaintiff further alleges that the said defendants claimed other statutes of the state of Colorado gave them also the right to arrest, imprison and detain the plaintiff, as described in the complaint, and under color of said laws they did arrest, imprison and detain the plaintiff as in said complaint set forth. He asserts that he is unable to set out in his complaint (folio 18) said statutes, as he is not able to find them in the statute books or laws of Colorado; such statutes were never pointed out to him by the defendants, notwithstanding their claim that the laws of said state empowered them to act toward him as in his complaint set forth, and that, under color of the laws of Colorado, both those which are mentioned and those which the plaintiff in error has not been able to find, defendants deprived him of his liberty. He then avers that his arrest and detention were made the subject of an application to the Supreme Court of the state of Colorado for a writ of *habeas corpus*. That the writ was allowed, and that in the return thereto the respondents, the defendants in error here, did not claim (folio 19) that the courts of said state, or in any part of said state, were overthrown, and that a trial could not be had to determine any charge of crime made against the plaintiff. He

avers that Bell, in his return to the writ, and in justification of the arrest, said, in substance and effect, that, as adjutant general of the national guard, the governor had given him orders to arrest and detain the plaintiff in error and not to release him under any circumstances until further orders from the governor of the state. That Wells was his subordinate military officer, acting pursuant to his orders, and that the court was informed by him that the governor of the state, in the exercise and discharge of his constitutional duties and powers in the premises, had issued orders and instructions in his official capacity not to surrender or release the military custody of the plaintiff in error. The defendant Peabody certified to and endorsed the correctness of this statement in his return to the writ of *habeas corpus,* and also stated that he was acting in his official capacity under the laws of Colorado relating to the arrest, detention and imprisonment of the plaintiff in error. (Folio 19.)

In the proceedings had in the Supreme Court, plaintiff in error was denied bail, and a judgment was finally rendered deciding that the defendants in error, as governor, and officers under the governor, had the authority vested in them, under the Constitution and the sections thereof in the complaint set forth, and the statutes of the state, to hold and detain the plaintiff in error until, in their judgment, they saw fit to release him; thus, by said decision, as it is alleged, establishing it to be a law and regulation in Colorado, that the plaintiff in error, or any citizen therein, may, at the will of the governor and officers of the militia, be deprived of life, liberty or property without due process of law, and that they may deny any person within the state of Colorado the equal protection of the laws, and that, by the acts and decisions of said court, the plaintiff in error, or any other person similarly situated, can not obtain in the courts of Colorado any redress for the grievous wrongs so inflicted upon him or them, by reason of said decision, which it is claimed is contrary to and annuls the provision of the Constitution and laws of the United States relative to personal rights.

Notwithstanding the rendition of that opinion, and the claim of the defendants founded thereon, the plaintiff in error

asserts and alleges that his arrest and imprisonment by them was without probable cause, and without legal process or color thereof, and not in due course of law; that his arrest and imprisonment, notwithstanding the action of the defendants, under the guise and color of the laws of said state of Colorado, as they were construed by and determined in the opinion of the Supreme Court of said state, were contrary to the Constitution and laws of the United States, and that the course and conduct of the defendants, and each of them, was in wanton and reckless disregard of the rights of the plaintiff, and wholly in disregard of the rights, privileges and immunities guaranteed to the plaintiff by the Constitution and laws of the United States.

The plaintiff in error further avers that he had conducted himself as a law-abiding citizen of the United States and of the state of Colorado at all times. That during the times mentioned in the complaint any person having committed a crime, or being charged with the commission of a crime, the Constitution and laws of Colorado required that he should be informed of such charge in writing, under oath or affirmation; that he should have the right to appear in court and defend in person or by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy and public trial by an impartial jury in the district in which the offense was alleged to have been committed, and that, pending trial, the person charged with crime, except for a capital offense, should be bailable on furnishing sufficient sureties; that to give any person who it is alleged has violated any law, or who it is believed has violated any law of Colorado, the privileges and immunities of citizens of the United States due process of law and the equal protection of the law, they should be and must be proceeded against in accordance with the aforesaid requirements and provisions of the laws of Colorado.

He then alleges (folio 22) that at no time was there any complaint, under oath or affirmation, lodged or filed in any court of competent jurisdiction, against the plaintiff in error, and during all of the time he was prevented from having access to the courts of said state, from the privilege of demanding in

any court of competent jurisdiction the nature of the cause of the accusation, from meeting witnesses, if any, against him face to face, and from having a speedy and public trial by an impartial jury of the county and district in which any alleged offense or supposed offense was alleged to have been committed by him. THAT DURING ALL THE TIME OF THE ARREST, DETENTION AND IMPRISONMENT, THE COURTS OF THE STATE WERE OPEN AND IN THE FREE AND UNDISTURBED ADMINISTRATION OF JUSTICE, EXCEPT IN SO FAR AS THE DEFENDANTS PREVENTED SAID COURTS FROM ADMINISTERING JUDICIALLY THE LAW OF THE STATE. (Folio 22.)

He then alleges that he was not, during any of the time mentioned, a member of the national guard of the state, or subject to its rules or regulations. That during his imprisonment he was compelled to stay almost all of the time in the city jail of Telluride, and that an armed guard, or guards, were kept constantly near and about him; that the jail was damp and unwholesome; that by reason thereof he contracted an illness which greatly impaired and shattered his health and from which he still suffers, and that by reason of the false arrest, imprisonment and detention complained of, he suffered great humiliation of mind and mental anguish, which also tended to impair, and did impair, his health, and that he still suffers from such impairment to his damage, as it is said, in the sum of one hundred thousand dollars. (Folio 23.)

He then avers that by these acts committed by the defendants in error as against him he was deprived of privileges and immunities belonging to a citizen of the United States, of his liberty without due process of law, and denied the equal protection of the laws guaranteed to him by the Constitution and laws of the United States, and he further avers that none of the defendants have been convicted in any criminal prosecution for any of the wrongful acts charged in said complaint. He then asks for damages, which are laid in the sum of one hundred thousand dollars, and in default of the payment of any judgment which may be obtained therefor, he prays for a body execution. (Folio 24.)

A motion to dismiss having been interposed, same was, after argument, overruled. (Folio 26.) The opinion overruling the same, although it is a matter of no importance here, is found at folios 152-155.

Thereupon the defendants filed their joint and several demurrer, set forth at length in the transcript at folios 27-32.

By this demurrer it was claimed:

(a) That the Circuit Court had no jurisdiction of the action or the subject-matter thereof.

(b) That the amended complaint did not state facts sufficient to constitute a cause of action, for the reason that it appeared from the allegations therein contained that the matters were *res adjudicata* in the Supreme Court of the state of Colorado; and

(c) That independently of the question of *res adjudicata* the amended complaint did not state facts sufficient to constitute a cause of action.

Other parts of the demurrer alleged ambiguity and uncertainty, but in view of the action taken by the court below, they are not necessary to be considered here. The defendants, in their demurrer, also craved oyer of the record in the Supreme Court, and in order that the questions involved might be fairly and fully presented without regard to the technical right of the defendants to import into the complaint something which did not appear to be there, it was stipulated that a certified copy of the record from the Supreme Court of the state of Colorado might be taken and considered to be a part of the amended complaint. (Folio 115.) This certified copy of the transcript appears in folio 33 *et seq.* of the transcript here.

Briefly stated, it shows that the petitioner in the Supreme Court of the state of Colorado, the plaintiff in error here, is a native born citizen of the United States, and for several years had been a citizen of the state of Colorado and a resident of the city and county of Denver.

That on the 25th of March, A. D. 1904, he was present at the city of Ouray, county of Ouray and state of Colorado, in the transaction of business connected with his office as president of a labor organization known as The Western Federation of Miners.

That on that date a certain organization known as The Citizens' Alliance of the city of Telluride, in the county of San Miguel and state of Colorado (which is a county adjoining the county of Ouray), composed of certain individuals engaged in the business of merchandising, banking, gambling and liquor selling, conceived the idea of arresting the body of the plaintiff in error and incarcerating it in the common jail of the county of San Miguel, and to that end conspired, confederated and agreed together that one of their number should swear out a warrant before a justice of the peace in San Miguel county, charging the plaintiff in error with an alleged criminal offense, under a statute of the state of Colorado, in that he had violated the provisions of an act entitled "An act to prevent the desecration of the flag of the United States and of the flag of the state," approved on the 28th day of March, 1901, and found at page 182 of the Session Laws of that year, by causing to be circulated in the county of San Miguel a United States flag bearing certain words thereon, alleged to be contrary to the form of the statute. A justice of the peace of San Miguel county issued a warrant, placed it in the hands of the sheriff of that county, who went to the county of Ouray (folio 35), arrested the plaintiff in error, and incarcerated him in the common jail in the city of Telluride, county of San Miguel and state of Colorado.

On the 28th day of March the plaintiff in error, being taken before the justice of the peace, waived the hearing on the charge, and was let to bail in the sum of five hundred dollars to answer for his appearance at the next term of the District Court of that county. He immediately furnished the bond and was at once allowed to go at large, so far as the civil authorities of the county of San Miguel were concerned.

On the 23d of March, five days before that time, Governor Peabody had issued an executive proclamation (folio 36) wherein it was recited that a certain class of individuals existing in San Miguel county were acting in conjunction with a certain large number of persons outside of that county, who were fully armed, and who had made open and public threats to resist the laws of the state and offer violence to citizens and property located in San Miguel county. The proclamation recited, also,

that at divers and sundry other times various crimes had been committed in San Miguel county under the aid and direction of these vicious and lawless persons who were in the county and outside of the county; also, that the executive believed that violence would be resorted to, and that it had been stated to him by the sheriff of San Miguel county that the forces so described, and within and without the county, were about to join forces therein for the purpose of destroying property and inflicting personal injuries upon the citizens of said county, and that, by reason thereof, the civil authorities were unable to cope with the situation.

After these recitations had been made in the said proclamation, the governor proceeded to "proclaim and declare the said county of San Miguel, in the state of Colorado, to be in a state of insurrection and rebellion." (Folio 37.)

Upon this proclamation an executive order was made, in which the adjutant general of the state was directed to forthwith order out such troops as "may be necessary, and to report forthwith to the sheriff of said San Miguel county, Colorado, and that you use such means as you may deem right and proper, acting in conjunction with, or independently of, the civil authorities of said San Miguel county, as in your judgment and discretion conditions demand, to restore peace and good order in said community, and to enforce obedience to the Constitution and laws of this state."

That between that time and the 28th day of March, aforesaid, the adjutant general proceeded to the city of Telluride, with about three hundred men, officers and soldiers, constituting a portion of the national guard of the state of Colorado, and that, on the morning of the 29th day of March, the said Bell and Wells arrested the body of the plaintiff, and at the time of filing the petition in the Supreme Court of the state, still retained the said body in custody and in prison. That such arrest and imprisonment was without any process or warrant of law at all, none such ever having been issued, the pretended ground being some pretended military necessity, the cause of which was not stated, but the real cause of which, as it was averred in the petition for the writ of *habeas corpus,* was pursuant to an unlawful conspiracy, confederation and agreement of the members of the Citizens' Alliance of Telluride, of which Wells was an

active and conspicuous member, and to which Bell had given his aid, countenance and support, and the aid, countenance and support of the miiitary organization of the state of Colorado. (Folio 39.)

It appeared further in said petition that on the 29th day of March, 1904, an application was made, in due form, to the judge of the District Court of the Seventh judicial district (that being the judicial district in which San Miguel county was embraced), at chambers in the city of Grand Junction, county of Mesa and state of Colorado, for a writ of *habeas corpus* to test the right of Bell and Wells to so detain the body of the plaintiff in error. This petition appears at folio 40 of the transcript.

The district judge, as he was empowered to do by the statutes of the state of Colorado, issued his order for the writ (folio 41), which writ was, by the clerk of the District Court of Ouray county, duly issued, in manner and form as required by the statutes of the state of Colorado, returnable on the 11th day of April, 1904.

On that day it was made to appear to the court that the writ had been duly served, in manner and form as required by the statute; but no attention was paid thereto by the defendants in error, Bell and Wells. The judge of the District Court, as he was empowered to do by the statutes of the state of Colorado, ordered the discharge of the plaintiff in error from the defendants in error, Bell and Wells. He further adjudged them to be guilty of contempt in not producing the prisoner before the court, with the cause of his detention, and, pursuant to the statute, ordered that an attachment should issue, and that they should be committed to the common jail of Ouray county till they should obey the writ, and be fined in the sum of five hundred dollars each, as a forfeit under the state statutes. (Folio 44.)

Thereupon, on the same day, the clerk of the District Court of Ouray county issued a warrant of commitment, which, on the next day, was duly placed in the hands of the sheriff of Ouray county for service. (Folio 45.)

The sheriff attempted to serve this wri. on the defendants in error Bell and Wells on the 13th day of April, 1904. (Folio

45.) The said Bell and Wells resisted that service, whereupon the sheriff called to his assistance the sheriff of the county of San Miguel to aid him in making the service. It appears (folio 46) that these sheriffs were unable to arrest Bell and Wells, for the reason that they called to their aid and assistance the members of the national guard to prevent the attempted service of the said writ, and that with such aid and assistance Bell and Wells loudly and boastfully, through the public press and otherwise, threatened the destruction and death of anyone who should interfere or attempt to interfere with them by the service of said writ, and particularly of the said sheriff of the county of Ouray or of any posse which might be called by him to aid in the execution of said writ. (Folio 46.)

The sheriff of Ouray being satisfied that he would be unable to complete the arrest even with bloodshed, since the said Bell and Wells were supported and maintained in their recalcitrancy by their co-defendant Peabody as governor of the state of Colorado, abandoned the attempt to serve the writ, and, notwithstanding the terms of the order which entitled the plaintiff in error to his discharge in that proceeding, he received no relief on account of the issuance of the said writ or the determination of the questions there involved by the judge of the District Court.

The District Court, and the judge thereof, appearing to be without power to carry into effect the decrees and judgments and orders of the court except through the county officers, and it appearing that the governor and Bell and Wells had the superior force, further attempt was made to secure the relief asked for by applying to the Supreme Court of the state of Colorado. He charged in his petition to that court (folio 48) that the governor had advised, encouraged, commanded, sanctioned and authorized the flagrant disobedience to the said writ by his co-defendants in error, Bell and Wells, and that all three of them were claiming that they and each of them were infinitely superior to any District Court or any district judge within the state of Colorado, and that they would neither obey nor respect the orders of said court, nor of the judges thereof, nor any of them; that they would determine in their own way and to their own ends what course they would pursue, and that

if it was attempted to be interfered with by the decree of any District Court or the order of any judge thereof, they would disregard such decree and would, if they deemed it necessary, imprison the judge who made the order and kill the sheriff or any other person who attempted to enforce it. (Folio 49.) That no indictment or information or complaint of any kind or character had been made against the plaintiff in error, except the single charge of desecrating the flag, which was a bailable offense, pending trial, and as to which the plaintiff in error had waived examination and had given bail. He further charged that, in effect, the proceedings which had been had in that matter were for the sole purpose of bringing his body into the county of San Miguel, where he had at no time theretofore been from without the boundaries thereof, in order that he might be arrested and detained arbitrarily by Bell and Wells, and that during the time of his arrest and imprisonment he had been subjected to the most revolting indignities and humiliations; that he had been abused and maltreated for the purpose of goading him into some trivial resistance to the said Bell and Wells, and the said members of the national guard acting under them, to the end that some apparently reasonable excuse might be found for slaying him. He then averred that the general assembly of the state of Colorado had never at any time passed any act suspending the writ of *habeas corpus*, or the privileges thereof, nor had it authorized the governor so to do, nor had the governor with respect to the said county of San Miguel ever directly or openly made any proclamation attempting to suspend the said writ or the privileges thereof. He further alleged that there was not, nor had there been, as a matter of fact, at any time within the bounds of the county of San Miguel any rebellion or invasion, nor had the public safety at any time demanded that the writ of *habeas corpus* or the privileges thereof should be suspended, either as to the plaintiff in error or any other person or persons. He made the distinct averment that the District Court of said county and the County Court of the same, and the Justice Courts thereof, had been, at all times in the petition mentioned, open and, during the regular terms, in session, with the duly elected and qualified judges presiding thereover, and that they were and had at all times

mentioned been engaged, in accordance with the statute, in the regular trial and disposition of cases upon their civil and criminal dockets, and the transaction of such other business as should properly come before the said courts, *and that, with the exception of the disobedience of the writs herein mentioned, relating to the plaintiff in error, the judgments of said courts and all orders made by them and the judges thereof are being, and at all times have been, respected and obeyed. That there was not at the time of filing the said petition, and never had been in the said county nor any part thereof, any insurrection or rebellion. That it was then and had been at all times in a state of peace and not of war, and that the only violations of the law which were at that time taking place in said county were due to the unlawful combinations and conspiracy of the said Citizens' Alliance, aided, abetted and encouraged thereto by James H. Peabody and Sherman Bell. That the civil authorities were meeting and had met with no resistance whatever in the execution of the process of the court, save only the resistance of the military authorities consisting of the governor, Bell and Wells.* That the district attorney had been at all times and was then willing and ready to file criminal complaints against any party or parties whenever furnished with the information necessary to the filing of such complaints, and that the County and District Courts of said county were impartial in their administration of the law, and that the public safety did not demand the suspension of the writ of habeas corpus or the privileges thereof as to the plaintiff in error or anybody else, and that no proclamation or proclamations had been made by the said governor as to the said county covering the period mentioned, other than those which were set out in the petition. (Folio 52.)

That the commanding general required the officers of the militia and the militia to act in the county of San Miguel under certain general orders which had been issued by him on or about December 5th, 1903. These orders, which form the most remarkable code of laws ever promulgated by the mind of a single man at any time or in any place upon the surface of this earth, are set forth in the transcript, folios 53 to 56.

It was claimed in the petition that by the arrest and imprisonment, the Constitution of the state of Colorado, and the rights guaranteed to the plaintiff in error under it, likewise that the fourteenth, the fourth, the fifth and the sixth amendments to the Constitution of the United States had been violated. It was then averred that Bell and Wells had refused to file, or cause to be filed, any criminal charge against plaintiff in error, and that they had refused to inform him of any charge which had been made against him. Some jurisdictional averments were then made, since the Supreme Court of the state of Colorado does not ordinarily sit in a habeas corpus proceeding, and therefore some extraordinary matters are necessary to be stated in the petition before that court will take jurisdiction.

This petition was filed in the Supreme Court of the state of Colorado on April 15th, 1904, and on the same day the writ issued, returnable on April 21st, of the same year.

This writ was served on the 16th day of April, 1904 (folio 63). Both Bell and Wells refused to receive service of the writ (folio 63), for reasons then stated by them, serving upon the officer who attempted to serve the writ, a written notice, which appears at folio 65, wherein it appears that the adjutant general, in anticipation of the service of the writ, had, on the same day, issued an order to Wells in which he had instructed him to "hold and detain all military prisoners in the hands of the military in this district, and will under no circumstances or conditions release from custody or deliver from Camp Telluride, one military prisoner, Charles H. Moyer, president of the Western Federation of Miners, now under arrest and detention, and being so held *under the will and judgment of the military commander as a military necessity, and for the preservation of law and order, that peace and quiet may prevail in this community and state, and that rebellion and insurrection is at an end in this county and state,* until further orders from his excellency, Honorable James H. Peabody, governor and commander-in-chief of the military forces of the state of Colorado, or from Sherman M. Bell, brigadier general, adjutant general, state of Colorado, either by executive, general, special or field orders or instructions. *You will not per-*

mit the service upon you of any civil process of arrest or other papers issued from the civil courts of the state, of any character, kind or nature whatsoever, under exemption by law, until further orders and directions from the governor and commander-in-chief or MYSELF."

As a return to this writ the respondents filed a motion to quash (folio 67), upon the ground that the Supreme Court had no authority to interfere with the restraint of liberty mentioned therein, for the reason that it appeared "from the statement of facts recited and set forth in said petition" that the arrest and detention was by the military acting under the orders of the governor, and the Supreme Court was expressly advised by the said motion to quash that the production of the body of Moyer was not in obedience to the command of the writ, and not by way of recognition of the jurisdiction of the court, but was "solely as an act of courtesy on the part of the chief executive of the state and commander-in-chief of its military forces."

By a separate paper the defendant in error Bell filed a protest in the said court against the exercise of further jurisdiction relative to the subject-matter of the petition, in which he charged that there was a state of insurrection and rebellion existing in the county of San Miguel on the 23d day of March, A. D. 1904, and that this was so because it was "evidenced by a proclamation and executive order in that behalf, and the facts and conditions therein set forth." That pursuant to the executive order, a copy of which was set forth in the petition, the defendant in error Bell averred that he had proceeded to the county of San Miguel, accompanied by and in charge and command of such members of the National Guard, officers and men, as in his judgment was requisite to carry out the object and process of the executive order, and that ever since that time he had been engaged in and throughout the said county in the performance of those duties, and that he had acted "independently of the civil authorities of said county of San Miguel, for the reason that said authorities were found by the said governor and the undersigned to be wholly powerless to render any aid whatsoever in the existing state of insurrection

and rebellion as aforesaid" (to wit, the existing state of rebellion which was only claimed to be evidenced by the executive proclamation hereinbefore referred to). That while he was engaged in that enterprise, to wit, the suppression of this state of insurrection and rebellion which was "evidenced by the proclamation and executive order in that behalf" (only), he, Bell, "had good reason to believe, and did and does in good faith believe, and upon due inquiry in the premises became personally and officially fully satisfied and convinced that the said petitioner, Charles H. Moyer, had been and, if discharged from arrest, would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion recited and set forth in said executive order, and was and is a prominent leader of the bands of lawless men engaged in the acts of insurrection and crimes mentioned in said proclamation and orders, in said county of San Miguel, and that in order to accomplish the suppression of said state of insurrection and rebellion it was and is, in the judgment of said governor and the undersigned (the said Bell), absolutely necessary to arrest, detain and for some time to come to restrain the body of the said Charles H. Moyer by the said National Guard of the said state of Colorado, in the course of an absolutely necessary step in the matter of suppressing said state of insurrection and rebellion."

That, so believing, he did cause the arrest, on the 29th day of March, 1904, and that he did restrain, and at the time of said answer continued to restrain, detain and imprison the said Moyer, for the reasons, upon the grounds *and by virtue of the power and authority so conferred*, and in the discharge of the duties so enjoined upon the undersigned. He then alleged that it was the purpose and intention of himself, in his official capacity, to release Moyer from military arrest "as soon as the same can be safely done with reference to the suppression of the existing state of insurrection and rebellion, and then to surrender him to the civil authorities of said county to be dealt with in the ordinary course of justice after said insurrection is suppressed."

He further informed the court that the exigencies of the military situation required such detention in order to prevent

Moyer "from lending aid, comfort, direction, instructions and commands to the said lawless persons in the further prosecution of the acts" which he had mentioned in his answer, and that "the present and reasonable further detention of the person of said Charles H. Moyer (ought to be) in no wise interfered with by the writ of habeas corpus or other judicial writ whatsoever."

He then advised the court that under his orders and instructions he would not in any event release Moyer until he was otherwise commanded by the governor. (Folio 75.) He alleged that Wells was his subordinate and that all and singular of the acts of the said Wells had been performed by his direction.

To this answer Governor Peabody officially certified that all of the acts and things which had been done by Bell and Wells had met his approval and had received his sanction. That the situation which had called for the executive proclamation was a communication which he had received from certain residents, officials and citizens (self-styled) of the county of San Miguel, wherein they had declared (folio 77) that certain persons outside of the county, together with certain persons in the county, were threatening to join forces within the county for the purpose of destroying property and inflicting personal injuries upon the citizens of said county. That these persons, who were in charge of what was termed a mob, were the same persons who had before that time committed numerous acts of violence, some of which had resulted in murder and destruction of property, and that, acting together as they were, they would by force attempt to commit violence within the county, and that they were threatening to break and resist the laws of the state; that the civil authorities were unable to suppress the same, and could not provide safety to the persons and property of the residents of the county, and that the petitioners had reasonable apprehension that there would be a great loss of life and sacrifice of property unless immediate and decisive action should be taken through the military authorities to suppress and quiet this body of men.

This petition was confirmed by telegram from the sheriff of the county, who had been absent when it was originally presented.

As a part of this certificate was the recitation that, in the opinion of the governor, the insurrection and rebellion had not been fully suppressed on the 21st day of April, 1904.

Attached thereto was a copy of the proclamation and the executive orders, both of which had been set forth in the petition for the writ. (Folios 82-83.)

The writ itself appears at folio 85 of the transcript.

A reply was filed to the answer or return to the writ which had been made by the defendants, which, in effect, challenged its sufficiency in points of law, and then proceeded to aver certain special matters.

It was charged in this answer that there was no state of insurrection or rebellion in San Miguel county on the 23d day of March, 1904, nor at any other time; that shortly before that time a certain organization called The Citizens' Alliance, of the city of Telluride, in said county, was effected and brought into existence by certain mine owners, mine operators, merchants, bankers, liquor dealers and gamblers of the said city of Telluride, for the purpose of controlling the miners of that county, in violation of law, and in the supposed interests of the mine owners, mine operators, merchants, bankers, liquor dealers and gamblers, and, to that end, they had, shortly before the said date, organized themselves into a mob, and had deported about seventy men who had theretofore been miners, working in the various mines of that county. That these miners announced their intention of returning peaceably to their homes in said city and county, *"and they further announced that to that end they would resist any further interference with their persons, and they would resist any attempts at their redeportation, but that their mission in returning was one of peace, and no force whatever would be used by them, in any way, shape or form, except in defense of their persons from attack by the said mob or any member thereof. Thereupon certain members of the said mob, whose names are signed to the alleged petition to the governor of the state, set forth as an ex-*

hibit in the said return, did at once make representations to the governor of the state of Colorado as therein set forth, which said representations were a part of the plan of action theretofore agreed upon by the members of the said Citizens' Alliance for the purpose of controlling the said labor situation. That all of said proceedings were a part of and done in pursuance of a conspiracy entered into by the said members of the said Citizens' Alliance, as heretofore and in the petition herein set forth."

He then avers that while he is not responsible for what the adjutant general may believe, as a matter of fact he has been at all times a law-abiding citizen, and has at all times and in all places carried and conducted himself in strict conformity to the laws of the land, and has advised, in his capacity as president of The Western Federation of Miners, at all times and in all places, that no act of lawlessness occur upon the part of any member of the said Federation, to the end that no reflection might be cast upon the organization as other than a law-abiding, peaceable, conservative and order-loving organization existing for the purpose of bettering the social and financial conditions of its various members.

He further avers that whatever the judgment or belief of the governor or the respondents Bell and Wells may be with reference to the plaintiff in error, his arrest, incarceration and detention was and is in violation of the laws of the land and of the Constitution of the United States and of the state of Colorado.

On the return day of the writ the Supreme Court, recognizing the importance of the questions involved, declined to proceed, for the reason that one of the three members thereof was absent. Thereupon an application for bail was made, pending the adjournment of the hearing. This was denied in an opinion appearing at folios 93 to 99, by Justice Steele, who afterwards dissented from the opinion and judgment of the other two members of the court.

The denial of bail was predicated upon the challenge to the jurisdiction of the court, since it was necessary first to determine whether the court had jurisdiction before any proper order could be made granting bail.

On the 5th and 6th days of May (folio 99) the application was argued orally before the Supreme Court of the state of Colorado, and on the 6th day of June, 1904, an opinion was filed, concurred in by two of the three judges of that court, in which it was concluded that "the petitioner was lawfully arrested by the military authorities while the work of suppressing the insurrection in San Miguel county was in progress. Such arrest being lawful, his restraint by respondents until it is suppressed is not illegal." (Folio 112.)

This opinion is set forth in the transcript in full at folios 100-112, and the positions therein contained, and the authorities cited to sustain them, will be analyzed later on in this brief.

A dissenting opinion was filed by Mr. Justice Steele, now the chief justice of the Supreme Court of the state of Colorado, and this opinion appears in 35 Colo., on pages 170 to 217. There was a supplemental opinion, rendered by the majority of the court, which appears in the same volume from pages 217 to 225. This also will be analyzed later.

The demurrer to the complaint, with the transcript by stipulation agreed to be taken and considered as the part of the complaint, came on for hearing before United States District Judge Lewis, sitting in the Circuit Court of the United States for the district of Colorado, on the 25th day of September, 1906. (Folio 114.) The matter was argued on September 25th, 26th and 27th, and by the court taken under advisement. (Folios 115-116.)

On the 19th day of November, 1906, the demurrer was sustained. (Folio 116.)

On the 4th day of December, 1906, the plaintiff in error elected to stand upon his amended complaint, and declined to plead further, whereupon the cause was dismissed, and costs were taxed against the plaintiff in error. (Folio 117.)

Sixty days were allowed for a bill of exceptions. (Folio 117.)

On the 2d day of January, 1907, the plaintiff in error presented his bill of exceptions, which embraced the statement of facts and the opinion of the court rendered upon the demurrer. (Folios 119-137.) This opinion will be considered later.

On the same day Judge Lewis signed a certificate to the effect that the demurrer was sustained solely upon the ground that there was no jurisdiction in the Circuit Court of the United States to entertain the plaintiff's amended complaint. (Folio 138.)

A petition for a writ of error was filed January 19, 1907. (Folio 139.)

Accompanying this petition, and filed on the same day, was an assignment of errors. (Folio 141.)

A bond on writ of error having been fixed in the sum of five hundred dollars (folio 118), such bond was given, approved and filed on January 19, 1907. (Folio 144.)

An order allowing the writ of error was granted on the 19th day of January, 1907. (Folio 144.)

Praecipe for the transcript was filed January 19th, 1907. (Folio 145.)

The writ of error was issued on the 19th day of January, 1907. (Folio 146.)

Transcript of the record was transmitted, in accordance with the writ of error, on the 29th of January. (Folio 146.)

The citation was issued on the 19th of January, 1907. (Folio 148.)

Service was admitted on same on January 19th, 1907. (Folio 149.)

Certificate of the clerk as to the authenticity of the transcript was made on the 29th day of January, 1907. (Folio 151.)

Pursuant to the rule of this court, there was appended to the transcript a certified copy of the judge's memorandum filed on the motion to dismiss (folios 153-155), as well as a copy of the statement of facts and the opinion of the judge on the demurrer, both of which fully appear in the bill of exceptions. (Folios 155-172.)

Attached to these transcripts is a certificate of the clerk of the United States Circuit Court that such opinions as set forth are true, perfect and complete. (Folio 172.)

SPECIFICATION OF ERRORS.

A specification of the errors relied upon, asserted and intended to be urged on this hearing are as follows:

(a) The court erred in sustaining the demurrer of the defendants to the amended complaint of the plaintiff.

(b) The court erred in dismissing the plaintiff's amended complaint.

(c) The court erred in dismissing the plaintiff's suit.

(d) The court erred in rendering final judgment for costs in favor of the defendants in error and against the plaintiff in error.

Upon each and every of these assignments the plaintiff in error asked and was allowed an exception. (Folio 141.)

BRIEF OF THE ARGUMENT.

The situation which is sought to be presented by the record now before the court may be stated in a nutshell.

Can any power, governmental, private or otherwise, arrest, detain and imprison the body of a citizen of the United States for seventy-eight days without any complaint of any kind or character in writing, under oath, when it is admitted that the regularly constituted and duly authorized courts are open and sitting for the regular transaction of business?

State it how we may, the result of this case is, in effect, determined by the answer to the above question. If there is any device by which a governmental officer or a private citizen can accomplish this purpose, either as a result of a declaration made by himself or anybody else, then the so-called guaranties of the fourteenth amendment and other portions of the Constitution of the United States, are not guaranties at all; they are nothing more nor less than high sounding promises, which can be set aside at the will of the executive of any state in the federal Union upon his mere

ipse dixit that a state of insurrection and rebellion exists in the place where a citizen, sought so to be confined, happens to be. If this is the law, it is high time that this tribunal should pronounce it. If it is not the law, it is equally high time that the governors of the various states in this Union should know, once for all, that such a procedure will not be tolerated. It has been declared by the Supreme Court of the state of Colorado that no case can be found in point as an authority for the condition here presented. It has been conceded in argument elsewhere, and we presume that it will be conceded here, that the opinion of the Supreme Court of Colorado is without precedent in any state in this Union. We have, therefore, if these statements are correct, a question of first impression and of vital importance to every citizen of the United States for determination. No question that ever came before this great tribunal will be more far-reaching in its consequences than the question here to be decided. It not only involves the freedom of every black man beneath the folds of the flag of this country, but of every white man, woman and child as well. No question so momentous has ever been waged in this or in any other tribunal, and we approach the solution of it with fear and trembling, so far as our ability is concerned to present it, but with the utmost fearlessness and confidence so far as the penetration of this supreme tribunal is concerned to decide it.

If the opinion of the Supreme Court of the state of Colorado is good law it is at once apparent that the governor of every state in this Union has the sole, unquestioned and unquestionable power to declare, without regard to the real fact, that a state of insurrection and rebellion exists in any portion or all of such state, and that the necessary and legal result of such a declaration, precluding, as it does, all inquiry whatsoever, at once places the liberty of every citizen within the borders of such state at the mercy of such executive until such time as he, in his good pleasure, if that time ever arrives, shall elect to declare that the state of insurrection and rebellion is at an end. To the discussion of this great, far-reaching and important question we will now address ourselves.

The amended complaint proceeds upon the theory that the plaintiff, being a citizen of the United States and a citizen and

resident of the state of Colorado, has been deprived of certain rights, privileges and immunities which are guaranteed to him by the Constitution of the United States, and for a deprivation of which section 1979 of the Revised Statutes of the United States authorizes him to maintain a recovery in damages.

The averments of the amended complaint show that the defendants were respectively the governor of the state of Colorado, the adjutant general of said state and a company captain in the militia thereof.

That on or about the 30th day of March, 1904, the defendants, as such officers and under color of the law of the state of Colorado claimed to govern them in that behalf, did arrest the plaintiff at about 8:05 a. m. That with force and arms they did deprive him of his liberty and subjected him to hardships, privations, humiliation and disgrace, from that time and until about the hour of 3:45 o'clock p. m. of June 15th in the same year. That his arrest, detention, imprisonment, hardships, privations and humiliation were all in defiance of his rights as a citizen of the United States, and that neither due nor any process of law was at any time sworn out against him, nor was he ever awarded any trial, either before a jury or otherwise, and that, too, at a time when the Constitution and statutes of the state of Colorado provided for due process of law, with all the particularity and detail with which that term is usually understood.

That the plaintiff attempted to have said arrest, detention and imprisonment questioned on a writ of heabeas corpus sued out in the Supreme Court of the state of Colorado, and that such Supreme Court, in defiance of the constitutional rights of this plaintiff, under the guaranties contained in the federal instrument, declared him not to have been either unduly or unlawfully imprisoned, and that he was remanded to and did remain in the custody of the defendants for the time mentioned, with the full sanction and authority, not only of the defendants, as governmental officers of the state of Colorado, but with the approbation of the Supreme Court of that state up to the time the opinion was rendered.

The defendants jointly and severally demur to this complaint for reasons which here may be grouped as follows:

(a) The Circuit Court of the United States is claimed to be without jurisdiction of the subject-matter of the suit.

(b) That it appears upon the face of the complaint that the matters therein complained of are *res adjudicata.*

(c) Insufficiency of facts stated.

These are all of the grounds of demurrer with which we have any concern here. We will discuss them in the order thus indicated, proceeding, first, to dispose of the question of jurisdiction.

HAS THE UNITED STATES CIRCUIT COURT JURISDICTION TO ENTERTAIN A CONTROVERSY, ARISING UNDER SECTION 1979 OF THE REVISED STATUTES OF THE UNITED STATES, FOR THE INFRINGEMENT OF A GUARANTY SECURED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

The right of the plaintiff to maintain his suit is founded in and rests upon the fourteenth amendment to the Constituion of the United States, which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

To the end that the rights thereby guaranteed might be more safely secured from infringement, there was enacted section 1979 of the Revised Statutes of the United States, which is as follows:

"Any person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding, for redress."

The statute is based upon the civil rights act of 1866, which was superseded by the passage of the fourteenth amendment to the Constitution in 1868, the predecessor to this statute deriving force and effect from the act of April 20, 1871, chapter 22, 17th Statutes at Large, page 13. The original act required, in direct terms, that any proceeding under the statute should be prosecuted in the several District or Circuit Courts of the United States. The statute in its present form omits any statement upon the subject of jurisdiction, but it has been expressly decided in the case of

Hemsley vs. Meyer, 45 Fed. Rep., 283, that,

"The provision in this section, as originally enacted, conferring jurisdiction on the District and the Circuit Courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction of those courts respectively."

It was also held in the same case:

"If the section was stricken out of the statute, the rights, privileges and immunities of the citizens under the Constitution and laws would remain to them, and the mode of seeking redress for a deprivation of these rights would be the same that it is now." * * *

"As it now stands in the Revised Statutes, it may be properly denominated a 'declaratory' statute."

In other words, an allegation in the complaint showing that one has been deprived of the constitutional guaranty of liberty, without due process of law, setting up and defining in his complaint what constitutes due process of law in the state courts, coupled with an averment that those state courts were in the untrammeled exercise of their jurisdiction, except insofar as they were interfered with by the defendants themselves, gives to the federal courts a jurisdiction to determine whether or not the statement of facts contained in the complaint is true, and if it is true, a right and duty devolves upon those courts to remedy that deprivation.

The object and purpose of the fourteenth amendment has been defined by the Supreme Court of the United States to the following effect:

The fourteenth amendment, as far as the prohibitions are concerned, has reference only to action by the state, the state being prohibited from denying to any person within its jurisdiction an equal protection of the laws, etc.

And, therefore, such statutes as were founded upon this amendment and which enumerated in part the civil rights to which the colored man is equally entitled with the white man, refer to encroachments by the state and are intended to protect the colored man against such encroachments by the state and by that alone.

It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. * * * It does not invest congress with power to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation *or state action* of the kind referred to.

Virginia vs. Rives, 100 U. S., 313.
Civil Rights Cases, 109 U. S., 3.
Ex Parte Plessy, 45 La. Ann., page 80.
Logan vs. The U. S., 144 U. S., 263.
Hall vs. Virginia, 8 Wall., 168.
Legrand vs. U. S., 12 Fed., 577.
Miller vs. N. Y., 13 Blatchf., 469.

What these defendants did appears to have been done by them as officers of the state. That action has met the sanction of the majority opinion of the Supreme Court of the state. If state action be obnoxious to the provisions of the fourteenth amendment to the Constitution of the United States, the jurisdiction of the Circuit Court to uphold the provisions of that section and to maintain the paramount law of the land, is apparent, and the duty devolves upon it, as an independent proposition, to declare what the Constitution means or to follow the declarations already made by this court upon that subject.

The sixteenth section of the judiciary act referred to in the case of Hemsley vs. Myers, cited supra, gives to the Circuit Courts original jurisdiction

"of all suits authorized by law to be brought by any person to redress the deprivation under color of any *law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States,* OR of any right secured by any law, providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

See section 629, page 507, of the Compiled Statutes of the United States, where the annotator uses this language:

"Suits for the purposes described in this paragraph are authorized by Revised Statutes, sections 1977-1979."

In Ex Parte Virginia, 100 U. S., 339, a judge of the County Court in Virginia was indicted in the District Court of the United States for discriminating against the selection of colored men on a jury about to be impaneled in that court. Being thus in custody he presented a petition for a writ of habeas corpus to the Supreme Court of the United States, averring that the court below had no jurisdiction. Indeed, the question of jurisdiction was the principal question decided in the case. The indictment and bench warrant, in virtue of which the petitioner was arrested and held in custody, found there complete justification in the act of congress of March 1, 1875, which provided that

"Any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.00."

The court says:

"The defendant has been indicted for the misdemeanor described in this act and it is not denied that he is now properly held in custody to answer the indictment, if the act of congress was warranted by the Constitution. The whole merits of the case are involved in the question whether the act was thus warranted."

The thirteenth and fourteenth amendments are then quoted, and a discussion of the object of them, when this language occurs:

"We have said the prohibitions of the fourteenth amendment are addressed to the states. They are, 'No *state* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a state, *by whatever instruments or in whatever modes that action may be taken.* A state acts by its legislative, *its executive* or its judicial authorities. *It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position, under a state government, deprives another* of property, life or *liberty,* without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and *as he acts in the name for the state,* and is *clothed with the state's power,* his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it." * * *

"We do not perceive *how holding an office under a state, and claiming to act for the state, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of congress to punish his disobedience.*"

Again, this court has said in the case of Ames vs. Kansas, 111 U. S., 449, page 470:

"The same exemption was claimed in Cohens vs. Virginia, 6 Wheat., 294, to show that the appellate jurisdiction of this court did not extend to the review of the judgments of a state court in a suit by a state against one of its citizens; but Chief Justice Marshall said: 'The argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his state, *but is not entitled to the same force, when urged to prove that this court can not inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state.* * * * It may be true that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and, therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more

important, a much more interesting, object *was the preservation of the Constitution and laws of the United States,* so far as they can be preserved by judicial authority; and, therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under the Constitution and those laws. *If the Constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws,* such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which *expressly extends the judicial power of the Union to all cases arising under the Constitution* and laws? After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Contstitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties.' (Pages 391-2.)

"The language of the act of 1875 in this particular is identical with that of the Constitution, and the evident purpose of congress was to make the original jurisdiction of the Circuit Courts co-extensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance. To quote again from Chief Justice Marshall, in Cohens vs. Virginia, page 379: 'The jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.' This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to *all* cases arising under the Constitution and laws, and the act of 1875 commits the exercise of that power to the Circuit Courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the Circuit Courts to sustain their exception 'on the spirit and true meaning of the act,' 'which spirit and true meaning must be so apparent as to overrule the words its framers have employed.' To the extent that the words conflict with other laws giving exclusive original jurisdiction to the Supreme Court this has been done, but no more. The judicial power of the United States exists under

the Constitution, and congress alone is authorized to distribute that power among courts."

It has been and probably will be claimed that the demurrer is directed to the proposition that the suit now before the court is one which is, in effect, against the state, and, as such, is prohibited.

It is true that the question to be decided involves the sufficiency of the state law as declared by the Supreme Court of Colorado under the Constitution of the United States.

It is also true that the action is one which is sought to be maintained against those who purported, as officers of the state, to act for the state and under its sanction and authority. But that is no reason why the suit should not be maintained, and the question has been expressly decided in an opinion rendered by the Supreme Court of the United States in what is commonly known as the Virginia coupon cases, the opinion being handed down in Poindexter vs. Greenhow, 114 U. S., 270, page 285:

"It is next objected that the suit of the plaintiff below could not be maintained, because it is substantially an action against the state of Virginia, to which it has not assented. It is said that the tax collector, who is sued, was an officer and agent of the state, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing the state, and, in refusing to receive the coupons tendered, simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that if any wrong has been done it has been done by the state in refusing to perform its contract, and for that wrong the state is alone liable, but is exempted from suit by the eleventh article of amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

"This immunity from suit, secured to the states, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in har-

mony with all the provisions of that instrument. That immunity, however, does not exempt the state from the operation of the constitutional provision that no state shall pas any law impairing the obligation of contracts; for it has long been settled that contracts between a state and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a state, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the state itself, on the part of the injured party, being a citizen of another state, or a citizen or subject of a foreign state. But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a state impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions which have been decided by this court since the adoption of the eleventh amendment to the Constitution are numerous. Fletcher vs. Peck, 6 Cranch, 87; New Jersey vs. Wilson, 7 Cranch, 164; Green vs. Biddle, 8 Wheat., 1, 84; Providence Bank vs. Billings, 4 Pet., 514; Woodruff vs. Trapnall, 10 How., 190; Wolff vs. New Orleans, 103 U. S., 358; Jefferson Branch Bank vs. Skelly, 1 Black, 436.

"It is also true, that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties. Accordingly, it was held in New Hampshire vs. Louisiana, and New York vs. Louisiana, 108, U. S., 76, that, although the judicial power of the United States extends to 'controversies between two or more states,' it did not embrace a suit in which, although nominally between two states, the plaintiff state had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names. So, on the other hand, in Cunningham vs. Macon and Brunswick Railroad Co., 109 U. S., 446, where the state of Georgia was not nominally a party on the record, it was held that, as it clearly appeared that the state was so interested in the property that final relief could not be granted without making it a party, the court was without jurisdiction.

"In that case the general question was discussed in the light of the authorities, and the cases in which the court had taken jurisdiction, when the objection had been interposed, that a state was a necessary party to enable the court to grant relief, were examined and classified. The second head of that classification is thus described: *'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer.* To make out his defense he must show that his authority was sufficient in law to protect him.' And in illustration of this principle reference was made to Mitchell vs. Harmony, 13 How., 115; Bates vs. Clark, 95 U. S., 204; Meigs vs. McClung, 9 Cranch, 11; Wilcox vs. Jackson, 13 Pet., 498; Brown vs. Huger, 21 How., 305; Grisar vs. McDowell, 6 Wall., 363; and United States vs. Lee, 106 U. S., 196.

"The ratio decidendi in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. *That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia;* and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant or law, and therefore a wrong. *He stands, then, stripped of his official character; and, con-*

fessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense.

"No better illustration of this principle can be found than that which is furnished by the case of United States vs. Lee, 106 U. S., 196, in which it was applied to a claim made on behalf of the national government. The action was one in ejectment, to recover possession of lands, to which the plaintiff claimed title. The defendants were natural persons, whose defense was that they were in possession, as officers of the United States, under the orders of the government and for its uses. The attorney general called this aspect of the case to the attention of the court, but without making the United States a party defendant. It was decided by this court that to sustain the defense, and to defeat the plaintiff's cause of action, it was necessary to show that the defendants were in possession, under the United States, and on their behalf, by virtue of some valid authority. As this could not be shown, the contrary clearly appearing, possession of lands, actually in use as a national cemetery, was adjudged to the plaintiffs. The decision in that case was rested largely upon the authority of Osborn vs. Bank of the United States, 9 Wheat., 738, which was a suit in equity against an officer of the state of Ohio, who sought to enforce one of her statutes, which was in violation of rights secured to the bank by the Constitution of the United States. The defendants, Osborn and others, denied the jurisdiction of the court, upon the ground that the state was the real party in interest and could not be sued, and that a suit against her officers, who were executing her will, was in violation of the eleventh amendment of the Constitution. To this objection, Chief Justice Marshall replied: 'If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party can not be brought before the court, a suit can not be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to *say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the*

suit.' This language, it may be observed, was quoted with approval in United States vs. Lee. The principle which it enunciates constitutes the very foundation upon which the decision in that case rested.

"In the discussion of such questions, *the distinction between the government* of a state and *the state itself* is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. The Constitution of the state is the limit of the authority of its government, *and both government and state are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof.* So that, while it is true in respect to the government of a state, as was said in Langford vs. United States, 101 U. S., 341, that the maxim, that the king can do no wrong, has no place in our system of government, yet, it is also true, in respect to the state itself, that whatever wrong is attempted in its name is imputable to its government, and not to the state, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the state, *but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.* It was upon the ground of this important distinction that this court proceeded in the case of Texas vs. White, 7 Wall., 700, when it adjudged that the acts of secession, which constituted the civil war of 1861, were the unlawful acts of usurping state governments, and not the acts of the states themselves, inasmuch as 'the Constitution,' in all its provisions, looks to an indestructible Union, composed of indestructible states; and that, consequently, the war itself was not a war between the states, nor a war of the United States against states, but a war of the United States against unlawful and usurping governments, representing not the states, but a rebellion against the United States. This is, in substance, what was said by Chief Justice Chase, delivering the opinion of the court in Thorington vs. Smith, 8 Wall., 1, 9, when he declared, speaking of the Confederate government, that 'it was regarded as simply

the military representative of the insurrection against the authority of the United States.' The same distinction was declared and enforced in Williams vs. Bruffy, 96 U. S., 176, 192, and in Horn vs. Lockhart, 17 Wall., 570, both of which were referred to and approved in Keith vs. Clark, 97 U. S., 454, 465.

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state; to say, "L' Etat c' est moi." *Of what avail are written Constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked, and of communism, which is its twin—the double progeny of the same evil birth.*

"It was said by Chief Justice Chase, speaking for the whole court in Lane County vs. Oregon, 7 Wall., 71, 76, that the people, through the Constitution of the United States, 'established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states.' In no other way can the supremacy of that Constitution be maintained. It creates a government in fact, as well as in name, because its Constitution is the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding;' and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the states themselves. *The mandate of the state affords no justification for the invasion of rights secured by*

the Constitution of the United States; otherwise, that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a state (ergo, a decision of a state Supreme Court) which is in violation of the Constitution of the United States, as his authority for taking or holding property to which the citizen asserts title, and for the protection or possession of which he appeals to the court, *to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the state, ignores the fundamental principles on which the Constitution rests, as contrasted with the articles of confederation, which it displaced; and, practically, makes the statutes of the states the supreme law of the land within their respective limits.*

"When, therefore, by the act of March 30, 1871, the contract was made, by which it was agreed that the coupons issued under that act should thereafter be receivable in payment of taxes, it was the contract of the state of Virginia, because, though made by the agency of the government, for the time being, of the state, that government was acting within the scope of its authority, and spoke with its voice as its true representative; and inasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract, when made, became thereby unchangeable and irrepealable by the state, the subsequent act of January 26, 1882, and all other like acts, which deny the obligation of that contract and forbid its performance, are not the acts of the state of Virginia. The true and real commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. *Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been.* The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the state of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The state of Virginia has done none of these things with which this defense charges her. The defendant in error is not her officer, her agent or her representative in the matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error, in fact and in law, is representing her as he seeks to establish her law, and vindicates her integrity as he maintains his own right." * * *

"And it is no objection to the remedy in such cases, *that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right;* for the cases are numerous where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States. At the present term of this court at least three cases have been decided, in which railroad companies have been complainants in equity, seeking to restrain officers of states from collecting taxes, on the ground of an exemption by contract, and no question of jurisdiction has been raised. The practice has become common, and is well settled on incontestable principles of equity procedure. Memphis Railroad vs. Railroad Commissioners, 112 U. S., 609; St. Louis, etc., Ry. Co. vs. Berry, 113 U. S., 465; Chesapeake & Ohio Railroad Co. vs. Miller, ante, 176." * * *

"The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

In the case of Yick Wo vs. Hopkins, reported in 118 U. S., at page 356, the question arose upon an ordinance of the city and county of San Francisco, which ordinance was claimed to have been violated by the plaintiff in error. He sued out a writ of habeas corpus to relieve him from custody under a sentence of the police judge of that city and county, from the Supreme Court of the state.

The Supreme Court, 68 Cal., 294, discharged the writ and remanded the prisoner, holding the ordinance valid and decided that, so far as the federal question was involved, that:

"We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of Barbier vs. Connolly, 113 U. S., 27, and Soon Hing vs. Crowley, 113 U. S., 703."

There was decided with this case when it came to the Supreme Court of the United States also the case of Wo Lee vs. Hopkins, his application having been made for a writ of habeas corpus in the Circuit Court of the United States and denied, upon the theory that the federal court was bound by the decision of the Supreme Court of California (just as it is claimed upon another ground of demurrer that we are bound by the action of the Supreme Court of this state).

Mr. Justice Matthews delivered the opinion of the court.

At the outset it was admitted that the question of his imprisonment under the Constitution and the laws of the state of California was not an open question. That the Supreme Court of that state had the power to decide that matter and the Supreme Court of the United States was powerless to decide it to the contrary, so far as the Constitution and statutes of the state of California were involved. It was held, however, that it was the duty of the court to reconsider and repass upon the ordinances of the city and county of San Francisco independently of the Supreme Court of the state, to the end that it might be determined *whether these ordinances, or the enforcement of them, were in conflict with the Constitution and laws of the United States.*

The opinion then discusses the ordinances, and reversed the Supreme Court of California upon its interpretation of them.

It was likewise held that the provisions of the fourteenth amendment forbade the ordinances in question, holding that the imprisonment of the petitioners was illegal. It may not be amiss to quote that part of the decision of the court upon this subject:

"Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases *of mere administration the responsibility is purely political,* no appeal

lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage, BUT THE FUNDAMENTAL RIGHTS TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS, CONSIDERED AS INDIVIDUAL POSSESSIONS, ARE SECURED BY THOSE MAXIMS OF CONSTITUTIONAL LAW WHICH ARE THE MONUMENTS SHOWING THE VICTORIOUS PROGRESS OF THE RACE IN SECURING TO MEN THE BLESSINGS OF CIVILIZATION UNDER THE REIGN OF JUST AND EQUAL LAWS, so that in the famous language of the Massachusetts Bill of Rights the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." * * *

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson vs. Mayor of New York, 92 U. S., 259; Chy Lung vs. Freeman, 92 U. S., 275; Ex Parte Virginia, 100 U. S., 339; Neal vs. Delaware, 103 U. S., 370; and Soon Hing vs. Crowley, 113 U. S., 703."

The only class of cases that we have been able to find which denies jurisdiction in the Circuit Courts in a case of this kind is where an injunction is sought, in the first instance, to prevent action on the part of the state courts. Such a case is that of:

Aultman & Taylor Co. vs. Brumfield, found in 102 Fed. Rep., page 7.

On account of the express prohibition contained in section 720 of the Revised Statutes of the United States, a suit, the object of which is to maintain an injunction against proceedings in the state courts, must be dismissed, but the court was very careful to say in that case that:

"The injunction heretofore granted must be dissolved, and the bill dismissed *for want of equitable jurisdiction,* BUT WITHOUT PREJUDICE TO THE RIGHT OF COMPLAINANT ON THE MERITS OF THE CASE."

There really is no authority, which we can find, which proceeds upon the theory that a Circuit Court is without jurisdiction where the infringement of a constitutional guaranty is set up in the complaint.

If it shall be argued that no federal question is involved, because the act complained of is one which has been taken by officers of the state in respect to a matter in which they were authorized to act under the Constitution and laws of the state, then the following authorities are in point:

The leading case on this subject is that of

Ex Parte Milligan, in 71 U. S., at page 2; 4 Wall., page 2.

This case is so familiar to every student of law that it seems a work of supererogation to call attention to it. The matter was so exhaustively argued, so ably considered and so superlatively stated, that it has become a classic in literature as well as in law.

Milligan presented his petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an unlawful imprisonment. He claimed that he had lived 20 years in Indiana, and that he had never been in the military or naval service of the United States. That on the 5th of October, 1864, he was arrested by order of the general commanding the military district of Indiana. That on the 21st of October he was brought before a military commission convened by order of the general, tried on charges and specifications, found guilty and sentenced to be hanged in the following May. After such sentence, and in the month of January, the Circuit Court of the United States met at Indianapolis, impaneled a grand jury and proceeded to inquire into violations of the law. This grand jury found no indictment or presentment against Milligan, nor was he indicted or presented in any other court. Milligan insisted that the commission had no jurisdiction to try him. That

the only right of trial was by jury, and it was guaranteed to him by the Constitution of the United States. After disposing of some preliminary matters, the court, page 118, proceeded to a discussion of the main question, which was:

"Upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction legally to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for 20 years past, and never in the military or naval service, is while at his home arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted and sentenced to be hanged by a military commission organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?"

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this cause are found in that clause of the original Constitution which says: 'That the trial of all

crimes, except in case of impeachment, shall be by jury;' and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue 'without proof of probable cause supported by oath and affirmation.' The fifth declares 'that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty or property, without due process of law.' And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION, TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.'

"These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek, by sharp and decisive measures, to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless estab-

lished by irrepealable law. THE HISTORY OF THE WORLD HAS TAUGHT THEM THAT WHAT WAS DONE IN THE PAST MIGHT BE ATTEMPTED IN THE FUTURE. THE CONSTITUTION OF THE UNITED STATES IS A LAW FOR RULERS AND PEOPLE, EQUALLY IN WAR AND IN PEACE, AND COVERS WITH THE SHIELD OF ITS PROTECTION ALL CLASSES OF MEN, AT ALL TIMES AND UNDER ALL CIRCUMSTANCES. NO DOCTRINE, INVOLVING MORE PERNICIOUS CONSEQUENCES, WAS EVER INVENTED BY THE WIT OF MAN THAN THAT ANY OF ITS PROVISIONS CAN BE SUSPENDED DURING ANY OF THE GREAT EXIGENCIES OF GOVERNMENT. SUCH A DOCTRINE LEADS DIRECTLY TO ANARCHY OR DESPOTISM, BUT THE THEORY OF NECESSITY, ON WHICH IT IS BASED, IS FALSE, FOR THE GOVERNMENT, WITHIN THE CONSTITUTION, HAS ALL THE POWERS GRANTED TO IT, WHICH ARE NECESSARY TO PRESERVE ITS EXISTENCE, AS HAS BEEN HAPPILY PROVED BY THE RESULT OF THE GREAT EFFORT TO THROW OFF ITS JUST AUTHORITY.

"Have any of the rights guaranteed by the Constitution been violated in the case of Milligan; and, if so, what are they?

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial part of the country was conferred on them, because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by congress. They can not justify on the mandate of the president, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'

"But it is said that the jurisdiction is complete under the 'laws and usages of war.'

"It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; THEY CAN NEVER BE APPLIED TO CITIZENS IN STATES WHICH HAVE UPHELD THE AUTHORITY OF THE GOVERNMENT, AND WHERE THE COURTS ARE OPEN AND THEIR PROCESS UNOBSTRUCTED. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts

always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by congress, and not composed of judges appointed during good behavior."

"WHY WAS HE NOT DELIVERED TO THE CIRCUIT COURT OF INDIANA TO BE PROCEEDED AGAINST ACCORDING TO LAW? NO REASON OF NECESSITY COULD BE URGED AGAINST IT, BECAUSE CONGRESS HAD DECLARED PENALTIES AGAINST THE OFFENSES CHARGED, PROVIDED FOR THEIR PUNISHMENT, AND DIRECTED THAT COURT TO HEAR AND DETERMINE THEM. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges, commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the president. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment, for its records disclose that it was constantly engaged in the trial of similar offenses, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief, and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

"ANOTHER GUARANTEE OF FREEDOM WAS BROKEN WHEN MILLIGAN WAS DENIED A TRIAL BY JURY. The great minds of the country have differed on the correct interpretation to be given to various provisions of the federal Constitution, and judicial decision has been often invoked to settle their true meaning; but until recently no one

ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, 'except cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger,' and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

"The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, *citizens of states where the courts are open,* if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by suffrance, *and can not be frittered away on any plea of state or political necessity.* When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need and should receive the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. *The proposi-*

tion is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers *to the rule of his will;* and in the exercise of his lawful authority can not be restrained, except by his superior officer or the president of the United States.

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, *substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.*

"The statement of this proposition shows its importance; *for, if true, republican government is a failure, and there is an end of liberty regulated by law.* Martial law, established on such a basis, *destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil powers'*—the attempt to do which by the king of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. *Civil liberty and this kind of martial law can not endure together; the antagonism is irreconcilable, and, in the conflict, one or the other must perish.*

"This nation, as experience has proved, can not always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. *Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.* If our fathers had failed to provide for just such a contingency, *they would have been false to the trust reposed in them.* They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell; *and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen.* For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, *by incorporating in a written Constitution the*

safeguards which time had proved were essential to its preservation. Not one of these safeguards can the president, or congress or the judiciary disturb, except the one concerning the writ of habeas corpus.

"It is essential to the safeguard of every government that, in a certain great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen that he shall be tried otherwise than by the course of the common law; if it had intended this result it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. *If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.* Happily, it is not so.

"It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander at the head of his army can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late rebellion, required that the loyal states should be placed within the limits of certain military districts and

commanders appointed in them; and it is urged that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. *Martial law cannot arise from a threatened invasion.* The *necessity must be actual and present, the invasion real, such as effectually closes the court and deposes the civil administration.*

"It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason the power of arrest could secure them until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal, and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, THE COURTS ARE ACTUALLY CLOSED, AND IT IS IMPOSSIBLE TO ADMINISTER CRIMINAL JUSTICE ACCORDING TO LAW, THEN, ON THE THEATRE OF ACTIVE MILITARY OPERATIONS, WHERE WAR REALLY PREVAILS, THERE IS A NECESSITY TO FURNISH A SUBSTITUTE FOR THE CIVIL AUTHORITY, THUS OVERTHROWN, TO PRESERVE THE SAFETY OF THE ARMY AND SOCIETY; AND AS NO POWER IS LEFT BUT THE MILITARY, IT IS ALLOWED TO GOVERN BY MARTIAL RULE UNTIL THE LAWS CAN HAVE THEIR FREE COURSE. AS NECESSITY CREATES THE RULE, SO IT LIMITS ITS DURATION; FOR, IF THIS GOVERNMENT IS CONTINUED AFTER THE COURTS ARE REINSTATED, IT IS A GROSS USURPATION OF POWER. MARTIAL RULE CAN NEVER EXIST WHERE THE COURTS ARE OPEN AND IN THE PROPER AND UNOBSTRUCTED EXERCISE OF THEIR JURISDICTION. It is also confined to the locality of actual war. Because, during the late rebellion, it could have been enforced in Virginia, where the national au-

thority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'" * * *

"But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

"This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required."

In the case of Ayers, 123 U. S., pages 443, 506, this language occurs:

"But this is not intended in any way to impinge upon the principle *which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.* In respect to the latter class of cases, we repeat what was said by this court in Board of Liquidation vs. McComb, 92 U. S., 531, 541: 'A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus

to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. *In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.'* An example and illustration of this class will be found in Seibert vs. Lewis, 122 U. S., 284.

"Nor need it be apprehended that the construction of the eleventh amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a state are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them WITHOUT REGARD TO THE CHARACTER IN WHICH THEY ASSUME TO ACT, OR THE NATURE OF THE EXEMPTION THEY MAY PLEAD IN JUSTIFICATION. NOTHING CAN BE INTERPOSED BETWEEN THE INDIVIDUAL AND THE OBLIGATION HE OWES TO THE CONSTITUTION AND LAWS OF THE UNITED STATES, WHICH CAN SHIELD OR DEFEND HIM FROM THEIR JUST AUTHORITY, AND THE EXTENT AND LIMITS OF THAT AUTHORITY THE GOVERNMENT OF THE UNITED STATES, BY MEANS OF ITS JUDICIAL POWER, INTERPRETS AND APPLIES FOR ITSELF. IF, THEREFORE, AN INDIVIDUAL, ACTING UNDER THE ASSUMED AUTHORITY OF A STATE, AS ONE OF ITS OFFICERS, AND UNDER COLOR OF ITS LAWS, COMES INTO CONFLICT WITH THE SUPERIOR AUTHORITY OF A VALID LAW OF THE UNITED STATES HE IS STRIPPED OF HIS REPRESENTATIVE CHARACTER, AND SUBJECTED IN HIS PERSON TO THE CONSEQUENCES OF HIS INDIVIDUAL CONDUCT. THE STATE HAS NO POWER TO IMPART TO HIM ANY IMMUNITY FROM RESPONSIBILITY TO THE SUPREME AUTHORITY OF THE UNITED STATES."

In the case of Pennoyer vs. McConnaughy, 140 U. S., page 1, 10, this language is used:

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In Re Ayers, 123 U. S., 443; Louisiana vs. Jumel, 107 U. S., 711; Antoni vs. Greenhow, 107 U. S., 769; Cunningham vs. Macon & Brunswick Railroad, 109 U. S., 446; Hagood vs. Southern, 117 U. S., 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the eleventh amendment, an action against the state. Osborn vs. Bank of the United States, 9 Wheat., 738; Davis vs. Gray, 16 Wall., 203; Tomlinson vs. Branch, 15 Wall., 460; Litchfield vs. Webster County, 101 U. S., 773; Allen vs. Baltimore & Ohio Railroad, 114 U. S., 311; Board of Liquidation vs. McComb, 92 U. S., 531; Poindexter vs. Greenhow, 114 U. S., 270."

In Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362, page 390, Mr. Justice Brewer said:

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In Cunningham vs. Macon & Brunswick Railroad, 109 U. S., 446, 452, it was said:

"'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.'

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See Mitchell vs. Harmony, 13 How., 115; Bates vs. Clark, 95 U. S., 204; Meigs vs. McClung, 9 Cranch, 11; Wilcox vs. Jackson, 13 Pet., 498; Brown vs. Huger, 21 How., 305; Grisar vs. McDowell, 6 Wall., 363."

In the case of Scott vs. Donald, 165 U. S., page 58, 41 L. Ed., 632, the case arose in the Circuit Court of South Carolina. Two suits at law were brought by James Donald against J. M. Scott, and one by the same plaintiff against Gardner et al., wherein the plaintiff sought to recover damages caused by the action of the defendants, who were state constables in the state of South Carolina, in seizing and carrying away several packages of wines and liquors belonging to the plaintiff, and at the time of the seizure in possession of railroad companies, which, as common carriers, had brought the packages within the state.

Mr. Justice Shiras delivered the opinion of the court:

"The records in these cases present the question of the validity, under the Constitution of the United States, of the act of the general assembly of the state of South Carolina, approved January 2, 1895, generally known as the state dispensary law, and a copy of which is in the margin.

"A preliminary question is raised by the proposition that these are in fact suits against the state of South Carolina, and forbidden by the eleventh amendment. This queshtion is sufficiently disposed of by referring to the late case of Re Tyler, 149 U. S., 164 (37, 689), where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in

behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state.

"It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by the fifth section of the judiciary act of March 3, 1891, yet, as the case is before us, in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, under another clause of that statute, we have jurisdiction of the entire case and of all questions involved in it. Horner vs. United States, 143 U. S., 570; Carey vs. Houston & T. C. R. Co., 150 U. S., 181; Chappell vs. United States, 160 U. S., 499.

"Our inspection of these records does not satisfy us that this objection is well founded. The declaration or complaint alleges in each case that the plaintiff has been injured and damaged in the sum of $6,000 and demands judgment for that amount. It is urged that, as the value of the goods and chattels taken was alleged and shown to be but comparatively a few dollars, and as the recovery in each case was only in the sum of $300, we are obliged to infer that the damages alleged and demanded were without just foundation, and in the nature of a fraud upon the jurisdiction of the court.

"The declarations contain allegations which, if true, bring the cases within the well-settled doctrine that exemplary damages may in certain cases be assessed. After alleging that the plaintiffs, in importing for his own use the articles mentioned, was in the exercise of his legal rights guaranteed by the Constitution of the United States, it is averred, in the several declarations, that the defendants were notified that any seizure of said goods, under any pretense of authority, would be a grievous trespass and in disregard of constitutional rights, for which they would be held responsible; that the defendants, notwithstanding such notice, and claiming to act as constables of the state of South Carolina, forcibly seized and carried away the said packages; and that, in committing the said unlawful acts, the said defendants acted knowingly, wilfully and maliciously, and with intent to oppress and humiliate and intimidate the plaintiff, and make him afraid to rely upon the Constitution and laws of the United States and the judicial power thereof for his protection in the rights, privileges and immunities secured to him by the Constitution and laws of the United States; and that the defendants well knew they made said

seizures and committed said trespasses; that said acts were unlawful and forbidden by the laws and Constitution of the United States, but that they so acted, trusting and believing that they would be shielded and protected from all harm by their official superiors in the state of South Carolina; and that they made such seizures and committed such trespasses wilfully and maliciously with the purpose and intent to trample on the plaintiff's rights under the law and to do him all the injury in the power of the defendants.

"These allegations must, for the purpose of disposing of the present question, be accepted by us as true, or, at least, as susceptible of proof.

"Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression. While some courts and text-writers have questioned the soundness of this doctrine, it has been accepted in England in most of the states of this Union, and has received the sanction of this court." * * *

"Our inquiries thus far have proceeded on the assumption that the injuries complained of were inflicted in the enforcement of an unconstitutional law of the state. Sustaining the jurisdiction of the Circuit Court on that assumption, we are now brought to the more important and difficult question whether the so-called dispensary law of the state of South Carolina is, indeed, as to some or all of its parts, invalid, as being in conflict with the Constitution of the United States, and acts of congress made thereunder? Is that statute a lawful exercise of the police power of the state?

"In the present discussion we do not deem it necessary or desirable to review the numerous cases in which this court has had occasion to consider similar questions. We shall find it sufficient to apply to the case before us the conclusions announced in several very recent cases."

Then follows a discussion of several previous cases decided by the court and finally determined that:

"In the light of these cases the act of South Carolina of January 2, 1895, must, as to those of its provisions which affect the plaintiff in the present suits, stand condemned."

Tindal vs. Wesley, 167 U. S., 204; 42 L. Ed., 137, Mr. Justice Harlan speaking for the court said:

"The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those IN WHICH LIFE OR LIBERTY WAS INVADED BY PERSONS ASSUMING TO ACT UNDER THE AUTHORITY OF THE GOVERNMENT. Ex Parte Milligan, 71 U. S., 4 Wall., 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, WHAT REASON IS THERE THAT THE SAME COURTS SHALL NOT GIVE REMEDY TO THE CITIZEN WHOSE PROPERTY HAS BEEN SEIZED WITHOUT DUE PROCESS OF LAW, AND DEVOTED TO PUBLIC USE WITHOUT JUST COMPENSATION?"

"Upon the general proposition that the possession by officers, on behalf of the United States, of property claimed by a citizen, is sufficient of itself to protect those officers against suit by that citizen to recover possession, the court said: 'Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court—a case within

the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the president, have seized this estate and converted one part of it into a military fort and another into a cemetery.' Assuming, upon the record before the court, that the president had no lawful authority to place officers of the government in possession of the property in question, and that congress could not give him any such authority except upon making just compensation, the court said: 'The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property, without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of habeas corpus has often been used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See Ex Parte Milligan, 71 U. S.; 4 Wall., 2;' Kilbourn vs. Thompson, 103 U. S., 168.

"'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' Again: 'Shall it be said in the face of all this and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of congress and approved by the president to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived

of his property by force, his estate seized and cenverted to the use of the government without lawful authority, without any process of law and without any compensation, because the president has ordered it and his officers are in possession? *If such be the law of this country it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.* It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here; I hold by order of the president, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, *the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the secretary of war, which that officer had no more authority to make than the humblest private citizen.'*

"We have made these extracts from the opinion of the court in the Lee case because the reasons there assigned for the conclusion reached control the determination of the present case. If a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the government, we cannot perceive how the present suit can be regarded as one against the state merely because the defendants assert a right of possession in the state through them as its officers and agents."

Tuchman vs. Welch, 42 Fed. Rep., page 548, is a very interesting case decided by the Circuit Court in the district of Kansas.

The suit was one in equity on bill for injunction, and, by special order of the circuit judge, two judges were assigned for its hearing. The court, speaking by Phillips, said:

"The prisoner appealed to this court for his discharge by the writ of habeas corpus, and on a full, free hearing the court

of competent jurisdiction discharged him, and he resumed business as theretofore. Ante, 545. Then, under the injunction granted contemporaneously with the said warrant, and in aid of it, the respondent proposes to continue to pursue the accused as for a contempt for doing that which the order of discharge, in its legal consequence, authorized him to do.

"Impotent indeed must be the government whose judicial branch is without the power to challenge such repetitious infractions of the citizen's personal liberty and constitutional right to pursue a lawful avocation. If arrested for such contempt, this court would in duty feel bound to discharge him on habeas corpus proceeding on the admitted facts. But the respondent could again have him arrested under the same injunction as often as he might be so discharged and resume the prosecution of his business. If a case could ever arise to call into action the powers of a court of chancery to prevent the multiplicity of suits, and the harassment and persecution of the citizen, this certainly presents the strongest appeal to such protective power.

"Under the act of congress of 1867 authorizing the citizen, when restrained of his liberty contrary to the Constitution, to appeal to this court for a writ of habeas corpus, the party so holding him is allowed three days in which to make his return. And, as experience shows, in all the writs of habeas corpus which have recently been applied for in this court the respondent has claimed his three days in which to make return for the sheriff; so that the applicant, guilty or innocent, is kept in jail during this period before he can have a hearing and secure his liberty. So that, if he is to be remitted to that remedy which is the most expeditious known to the law side of the court, it is most inadequate. The fourteenth amendment to the federal Constitution recognizes the fact, and declares that all persons born or naturalized in the United States are citizens of the United States, as well as the state wherein they reside. Having thus proclaimed their citizenship, the government recognizes its obligation to extend protection where it expects allegiance. So the first section of the amendment declares:

"'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

"THIS IS A DIRECT RESTRAINT ON THE POWERS OF THE STATE, AND, OF CONSEQUENCE, ON ITS OF-

FICERS AND MINISTERIAL AGENTS, THROUGH WHOM IT MIGHT ATTEMPT ANY OF THE FORBIDDEN DEPRIVATIONS. In Re Ah Lee, 5 Fed. Rep., 902. Mr. Justice Field, in the Railroad Tax Cases, 13 Fed. Rep., 722, shows that, while the amendment in question had its origin in the purpose to secure to the newly-made citizens the full enjoyment of their freedom and rights, yet 'the generality of the language used extends the protection of its provisions to persons of every race and condition AGAINST DISCRIMINATING AND HOSTILE STATE ACTION OF ANY KIND. Its effect in preserving free institutions, and preventing harsh and oppressive state legislation, can hardly be overstated. * * * Its author, seeing HOW POSSIBLE IT WAS FOR THE STATE TO OPPRESS WITHOUT RELIEF FROM THE FEDERAL GOVERNMENT, PLACED IN THE CONSTITUTION AN INTERDICT UPON THEIR ACTION, WHICH MAKES LASTING OPPRESSION OF ANY KIND BY THEM UNDER THE FORM OF LAW IMPOSSIBLE.'"

After discussing some of the decisions and quoting the statute as it was originally enacted, the opinion proceeds:

"This is as comprehensive as it is explicit. It applies to any person, no matter who, officer or layman, who, under color of any law, statute, etc., of any state, shall subject, or cause to be subjected, any person within the whole jurisdiction of the federal government to the deprivation of any right, privilege or immunity, secured by the Constitution, and declares that he shall, notwithstanding any law, statute, regulation, etc., of the state, be liable to the party aggrieved in any action at law, suit in equity, or such proper proceeding for redress. AND IT THROWS WIDE OPEN THE DOORS OF THE FEDERAL COURTS AS THE ALTAR OF JUSTICE FOR HIS REFUGE. This section is carried forward into the Revised Statutes by section 1979." * * *

"The right to liberty and property, and the equal protection of the laws in the pursuit of a lawful avocation, are alike sheltered under the broad aegis of the Constitution, and congress has placed at the command of the citizens every weapon in the whole armory of justice for the protection of such constitutional rights." * * *

"A MOST EARNEST APPEAL IS MADE BY RESPONDENT TO THIS COURT TO LEAVE UNMOLESTED THE OFFICERS OF THE STATE IN THIS CONTROVERSY TO PROCEED THROUGH THE CUSTOMARY

CHANNELS OF THE STATE COURTS, LEAVING THE PETITIONER HIS REMEDY, AFTER FINAL DECISION IN THE COURT OF LAST RESORT IN THE STATE, OF APPEALING TO THE UNITED STATES SUPREME COURT. We sensibly recognize the importance of the rule of comity invoked, as essential to the preservation of the harmony and peaceful operation between the courts of the two jurisdictions, but I feel sure that in the coming time of dispassionate consideration and calmer reflection, when the feverish excitement of popular local sentiment shall give way to reason and a broader national spirit, the intelligence and patriotism of counsel will pronounce judgment for his constituents acquitting the federal judiciary in this controversy of the imputation of unduly interfering, when they are executing the high behests of the federal Constitution." * * *

"Until congress shall interpose, and confer upon the state the right to regulate this matter, loyalty to the supreme law of the land, and the obligation of good citizenship, demand that the state and its ministerial officers should forbear to provoke the occasion for the federal judiciary to assert their jurisdiction to see that the federal Constitution is recognized and obeyed. The most august thing in government is law, and the highest duty of citizenship is obedience to and respect for the law." Milligan v. Hovey, 3 Bissell 13.

Of course, we understand that the case of Tuchman vs. Welch, from which we have so liberally quoted, was overruled in the case of Helmsley vs. Myers, in 45 Fed. Rep., at page 283, but the question which caused it to be overruled was as to the inhibition of section 720 of the Revised Statutes of the United States, the effect of the writ which had been ordered being to either stay or control the action of the state courts. It was held that the express provision of section 720 was not impliedly repealed by section 1979. The point upon which the case ultimately turned in that court does not affect the question of jurisdiction in the case at bar, and that portion of the opinion which treats of section 1979 as though it were non-existent does not in any manner affect the jurisdiction involved in this proceeding.

We are aware, also, that the case of Tuchman vs. Welch has been criticised in the case of Aultman & Taylor Co. vs. Brumfield, 102 Fed. Rep., page 7. That case approved Helmsley

vs. Myers, and joined in a criticism of Tuchman vs. Welch, but solely upon the ground of the prohibition contained in section 720 of the Revised Statutes of the United States. In all of these causes jurisdiction was invoked on the equity side of the court, and in the preliminary determination of whether jurisdiction should be exercised it was necessary to consider the force and effect which section 720 had, in view of the fact that the judiciary act purported to vest in the Circuit and District Courts jurisdiction under section 1979, either "in an action at law, suit in equity, or other proper proceeding for redress."

Judges Phillips and Foster held that section 720 was impliedly repealed. The United States Circuit Judge Caldwell, in Helmsley vs. Myers, and Judges Lurton and Ricks, sitting in the Circuit Court for the Northern district of Ohio, disagreed with Judges Phillips and Foster.

That we are right in our views of the analysis of those decisions appears in the Aultman and Taylor case, where, upon the dismissal of the injunction, Judge Lurton said that it was to be "without prejudice to the right of complainant on the merits of the case."

It is difficult to see why, upon this branch of the demurrer, any authority at all should be required. Leaving out of consideration, as we are entitled to do, any question of *res adjudicata,* it would seem as though nothing could be added to the plain language of the Constitution and the acts of congress conferring jurisdiction on the Circuit Court in this class of cases. If we were compelled to rely on articles 4th, 5th and 6th of the amendments, a good deal might be said in support of the doctrine that the rights there secured were to be administered by the state courts in the first instance, and could only be questioned on a writ of error to the Supreme Court of the United States. The guaranties mentioned in those articles are not in words permitted to be enforced by acts of congress carrying them into effect or securing the rights thereby declared. The better reasoning, however, in our judgment, even upon those guaranties, would support the doctrine of direct cognizance by the federal courts. But, in any event, this case does not require us to enter upon any extended discussion of that matter, for the reason that, under the fourteenth amendment, not only

is the guaranty of liberty and the equal protection of the laws set forth, but by the express declaration of the states under section 5, "the congress shall have power to enforce by appropriate legislation the provisions of this article." Congress having that power to enforce the provisions of the fourteenth amendment, and the fourteenth amendment guaranteeing to every citizen of the United States liberty, except when it is interfered with by due process of law, proceeded, in accordance with the strict letter of the authority of the amendment itself, by the act of April 20, 1871, chapter 22, section 1, 17 Statutes, 13, to enact into a law what is now known as section 1979. That section recites that

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

As a part of the same act congress provided, by what is now section 629 of the Revised Statutes, paragraph 16, that the Circuit Court should have original jurisdiction

"Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

It will be observed, further, that this act of April 20, 1871, was entitled

"An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States and for other purposes."

Can there be any doubt, therefore, or even any specious argument, that the United States Circuit Court has not jurisdiction of the subject-matter of this alleged deprivation? It

is but begging the question to say that if there has been no deprivation, of course there is no jurisdiction for that reason, but to say that the United States Circuit Court has not original jurisdiction of a violation of the guaranties contained in the fourteenth amendment is to say, in effect, some one or more of the following things:

First. That the fourteenth amendment does not mean what it says.

Second. That no power has been given to congress to enact any legislation for the enforcement of the guaranties therein provided.

Third. That if the congress hae been given that power, it has not enacted any such statute.

Fourth. That notwithstanding section 1979 is found in an act of congress which purports expressly to be "An Act to Enforce the Provisions of the Fourteenth Amendment," nevertheless a subsequent section of the same statute, giving to the United States Circuit Court original jurisdiction, does not mean what it says.

Were it not for the pertinacity and ingenuity with which this provision of the demurrer has been urged nothing would be said in this brief except to recite the statutes; indeed, we are persuaded that, notwithstanding all that has been said, the act of congress is so plain upon the subject and the original jurisdiction given is so clear, that after the court has heard and read all that can be said against that jurisdiction, a mere rereading of the statutes will serve to overthrow the attempt of counsel to successfully demur to this complaint for the claimed inherent lack of jurisdiction.

Briefly considering what has been and probably will be said upon the subject, however, we proceed to analyze some of counsel's positions.

If we understand counsel correctly, it is claimed that the right of personal liberty, unless interfered with by due process of law, does not arise by virtue of any provision of the Constitution of the United States or of any amendment thereto. That such right of liberty was natural and inherent, and existed long prior to the formation of the Constitution,

and that any deprivation of that right is simply an infringement of what the citizen already had before the Constitution was enacted. Hence, when the citizen is deprived of the right of personal liberty without due process of law, he has not been deprived of a right arising under the Constitution of the United States, and his redress of the guaranty contained in the federal Constitution should be found in the state courts, which are, and of right ought to be, as much bound to administer and to administer correctly, the federal Constitution and the laws enacted in pursuance thereof, as they are to rightly interpret the state Constitutions and the state laws. The underlying fallacy of this argument is at once apparent upon the most casual consideration of the language governing the situation.

The fourteenth amendment guarantees liberty except when it is invaded by due process of law. That guaranty is of a right which already existed without, and long before, the statement contained in the amendment. The constitutional provision dealing with judicial power, article III, section 2, declares that

"The judicial power shall extend to all *cases* in law and equity *arising* under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

A case does not arise under the Constitution simply because there is a guaranty of a right secured by the fourteenth amendment. The case arises when the right of liberty has been invaded in violation of that amendment.

Now, suppose that the amendment deals with a right already existing; if no one invades that right no *case can arise.* A case arises when a guaranty secured by the Constitution is violated. Clearly, therefore, the Constitution itself delegates judicial power of a federal character to such case when the case arises. There could be no case until the guaranty of the Constitution itself is violated. Hence, when the provision of the Constitution states that congress shall have authority to enact laws carying into effect the rights secured (not the rights arising) by the Constitution of the United States, then there

is no question as to the authority, it seems to us, of the congress to give to the federal courts original jurisdiction in this class of cases. The confusion is not with the instrument, but in the minds of counsel where the distinction is not drawn between the "rights guaranteed" and the "cases arising."

Again, it is claimed, under this branch of the demurrer, that the acts complained of do not appear to have been done under color of authority, and that hence they become the mere tortious acts of the individuals, and since there is no diversity of citizenship, and since the fourteenth amendment only proceeds to operate upon state action and state enforcement, therefore the United States Circuit Court is without jurisdiction.

In this position counsel are clearly confounded by the authorities upon which they rely. It is true that, upon the face of the Constitution of the state of Colorado, no more authority exists to interfere with the liberty of a citizen without due process of law, than exists under the federal Constitution. It is, however, also true, that the plaintiff in error made that contention in the *habeas corpus* proceeding before the Supreme Court of the state of Colorado, and it was declared by two of the three judges of that court, thus establishing it to be the law in Colorado, that the actions of the defendants in error were authorized by the Constitution and the laws of the state of Colorado, and their acts, construed in the light of that Constitution and of those statutes, as understood by the majority of the Supreme Court of the state of Colorado, constitute due process of law, and that a detention of the body of a citizen of the United States without complaint, under oath, or arrest under warrant, or incarceration by virtue of written process, and at the will of a military commander, follow as a necessary result of the right of that commander to declare that a state of insurrection and rebellion exists, and such incarceration may continue until such military commander sees fit, in his good time, to say that the state of insurrection and rebellion is at an end.

In the case at bar this condition existed for seventy-eight days, during all of which time the plaintiff was deprived of his liberty.

When, therefore, the Supreme Court of the state of Colorado lent to the position of the governor its aid and counten-

ance by a declaration that he had not invaded the Constitution or the laws of the state of Colorado, his acts then, and those of his subordinates, were certainly done under color of law. They were certainly the result of state action, since he attempted to justify, and by the Supreme Court did justify, his action as an officer of the state, and his subordinates justified, because they were officers under him, under the sanction of the Supreme Court. The acts thus complained of, if they violate the Constitution of the United States and the acts of congress made pursuant thereto, while no less a tort of the individuals, are, at the same time, clothed with state sanction and state authority. Indeed, if this were not so, then there could never, by any possibility, be any state or condition of fact which would warrant a proceeding under the fourteenth amendment to the Constitution of the United States, and the acts of congress made pursuant thereto, because a complete answer always would be, This is a mere invasion of your private right by private action, and since the fourteenth amendment deals only with state action, and since the act of congress purports to be an act for the purpose of enforcing the provisions of that amendment, you are without right or standing in a federal court.

Let us examine some of the authorities which have been relied on elsewhere, and which will doubtless be urged here, for the purpose of throwing light upon this contention.

The cases of United States vs. Cruikshank, 92 U. S., 542, and United States vs. Harris, 106 U. S., 629, present, so far as they relate to the matter now under consideration, the question of whether or not an enactment of congress to enforce the private rights of individuals as against the private acts of other individuals are warranted by the fourteenth amendment to the Constitution of the United States, and in those cases it is declared that the fourteenth amendment being against state action or state enforcement, there is no warrant for congress to enact statutes which would punish private individuals for acts committed by them, resulting in the deprivation of the liberty of a citizen of the United States, without due process of law. It is perfectly clear that neither one of those cases has any application to the case at bar.

The Civil Rights cases in 109 U. S., page 3, simply decide that the fourteenth amendment gave no authority to congress to enact that either a private individual or the owner of an inn, or a public conveyance, or place of amusement, could not refuse accommodation, in accordance with the business carried on, as against a person of the African race. There was no question of state action involved, and no attempt to claim that what had been done by the various defendants in those cases was by reason of the color or sanction of any state law or usage.

In Clyatt vs. United States, 197 U. S., 207, the fourteenth amendment was only alluded to by way of contrast to the thirteenth amendment, which was there under consideration. To say that that case is an authority for any such position as has been taken here is to indulge in a great stretch of the imagination. We certainly contend for nothing other or different than that which is admitted to be proper by Mr. Justice Brewer in his reference to that amendment. The question there was whether an indictment which had been found under a law which had been passed pursuant to the thirteenth amendment was constitutional, and it was held, pursuant to the former holdings of the court, that there was no doubt that congress might enforce the thirteenth amendment by direct legislation, notwithstanding the fact that it would be enforceable without any legislation at all.

If, as a matter of fact, section 1979 were abolished, under the authority of that doctrine, leaving only the provisions of the fourteenth amendment and the act of congress giving jurisdiction to the Circuit Court, and, possibly without the aid of the latter, the United States Circuit Court would still have jurisdiction of this cause.

The difference which exists between the contestants in this proceeding arises from the misconception of one or the other as to what was called state action. It is entirely true that the recovery provided for by section 1979 is a punishment against an individual for the wrong which is done by that individual acting in an official capacity under color of a law, custom, usage or regulation. In a sense it is the mere private wrong of the individual which is complained of, but whenever there is

coupled with that mere private wrong the color and authority of state action and state usage, as in this case has been declared to be the fact by the Supreme Court of the state of Colorado, then the case falls squarely within the provisions of the fourteenth amendment to the Constitution, section 1979 of the Revised Statutes of the United States, and the sixteenth clause of the act giving jurisdiction to the Circuit Court in this class of cases.

It is believed that the provisions of the Constitution of the state of Colorado and the statutes made pursuant thereto, so far as they relate to the individual liberty of citizens of the United States, are sufficient for the protection of such individual if they had been rightly construed by the Supreme Court of the state. Judge Lewis was entirely right when he said that there was nothing upon the face of these provisions which apparently put them in conflict with the federal Constitution and legislation upon the same subject. But we must remember that to the state court is given first the right to pass upon the meaning of its Constitution and the laws which purport to be made pursuant thereto. In this case the court, by its majority opinion, has given a construction to those laws and to that Constitution which, unless it comes in conflict with the Constitution of the United States and with the acts of congress made pursuant thereto, is not only binding upon the plaintiff in error, but upon the federal courts as well. The right to declare, however, whether the Constitution of the United States has been violated with respect to the personal liberty of the plaintiff in error is one which is ultimately confided to this court, and if this court must say that the Colorado Constitution authorizes, as it has been construed to authorize, the proceeding which took place against the plaintiff in error, then it must determine for itself whether or not that authorization is or is not forbidden by the federal Constitution, and it cannot escape the responsibility which is placed upon it, by saying that upon the state court, as well as upon itself, devolves the right to construe the Constitution. The state court does have the right to construe the federal Constitution, but it must always construe it subject to the approval of this court, and

the state court must always construe its own Constitution and the laws made pursuant thereto, so that such construction will not be opposed to the federal compact and acts of congress properly passed thereunder. The Constitution of Colorado does not contain provisions, so long as the opinion in In re Moyer shall stand, for the sufficient safeguarding of personal rights. The Constitution of the state of Colorado does not mean what it says upon the face of it; it means at present what the Supreme Court of the state of Colorado has said that it means in In re Moyer, and what it has said destroys the guaranties secured to Moyer by the fourteenth amendment to the Constitution of the United States, and since the action which was taken against Moyer was taken under and pursuant to the Constitution and laws of the state of Colorado, the action was state action, within the meaning of the terms of the fourteenth amendment, prohibited by that amendment, and such prohibition was authorized to be punished by the act of congress. Congress has enacted, and it has confided, the jurisdiction to inflict that punishment, among others, to the Circuit Court of the United States. How, then, can our opponents say, in this proceeding, that such action so sanctioned by the Constitution and laws of Colorado, as decided by the Supreme Court of that state, was purely the action of individuals and not done under color of law? There was no claim that it was done by them except under color of law. They claimed that the law authorized them to take the action which they had taken; they claimed that such law was valid, and the Supreme Court, construing the laws upon which they relied, declared that their action was valid. It is true the effect of their action, if it shall be declared by this court as we contend, is personal in the sense that they must personally suffer for it. It is, nevertheless, state action, within the meaning of the Constitution, for the reason that there can be no action of any kind or character of a state except action which is taken through its officers. This action purported to be official action. If it was authorized it was unquestionably the action of the state. If it was unauthorized it was under color of the law of the state, and the tort which was committed under color of such law carries with it certain

consequences under the act of congress authorized to be made for that very purpose by the fourteenth amendment.

What is meant by Mr. Justice Field in his concurring opinion in Virginia vs. Rives, 100 U. S., 313-334, is better expressed in the opinion itself, by Mr. Justice Strong, at page 318:

"It is doubtless true that a state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive or the judicial department of the state. The mode of enforcement is left to its discretion."

In the specially concurring opinion of Mr. Justice Field, his mind was directed to a particular section of the civil rights act. After discussing the provisions of the fourteenth amendment, he says:

"As the state, in the administration of its government, acts through its executive, legislative and judicial departments, the inhibition applies to them."

The most that can be said with respect to this specially concurring opinion is, therefore, even if it were in a case on all fours with the one at bar, that the inhibition related to the action of one of the departments. That language, therefore, would govern this case. The action here was departmental action. It was the action of the executive through the military department, he being the commander-in-chief thereof. To say that it was not state action, within the meaning of the fourteenth amendment, is to declare, in effect, that there could be no such thing as state action.

But we shall presently see by other decisions, in which Mr. Justice Field concurred, and in some of which he wrote the opinion of the court, that there is no merit in quoting Virginia vs. Rives as an authority in this case for the other side.

In Barney vs. the City of New York, 193 U. S., 431-437, there was an express allegation in the bill that what was done was without authority and illegal, thus making it private action.

Here, we claim that what was done was with the authority of the governor of the state and his subordinate officers, claiming to act under the Constitution and laws of the state of Colorado, which had been declared by the Supreme Court to be a sufficient authorization, and which, under the declaration so made by that court, was in contravention of the provisions of the fourteenth amendment to the Constitution of the United States. In other words, the essential thing there alleged out of the case is laid as the foundation in the case at bar.

In St. Louis, Iron Mountain and Southern Ry. Co. vs. Davis, 132 Fed. Rep., 629-638, the very distinction for which we contend was made apparent in the following language:

"In that case (Barney vs. City of New York, 139 U. S., 430), as in this, the laws of the state of New York provided for proceedings in no way conflicting with any of the provisions of the fourteenth amendment. The officers, acting for the city of New York, but under the authority of the laws of the state of New York, *failed to comply with the acts of the legislature,* and their acts had been declared by the courts of the state of New York as violating the state law."

How different is the case at bar, where, in the teeth of the provisions of the Constitution and the statutes of the state, as we claim, the Supreme Court has declared that these officers were not violating the state law. On the contrary, they were acting in strict conformity with the state law.

After some discussion the court then proceeds to say that

"As the defendants were proceeding *not only in violation of the provisions of the state law, but in opposition to its plain prohibitions,* AS DECLARED BY THE COURTS OF THE STATE OF NEW YORK, * * * the decree of the Circuit Court dismissing the bill for want of jurisdiction was correct."

Quoting from the Barney case, Judge Treiber said:

"Controversies over violations of the laws of the state of New York are controversies to be dealt with by the courts of

the state. Complainant's grievance was that the law of the state had been broken, *and not a grievance inflicted by the action of the legislative or executive or judicial department of the state.* The principle is that it is for the state courts to remedy acts of *state officers done without authority of or contrary to the state law.*"

The state court was applied to in this case for the purpose of remedying the acts of state officers, claimed to have been done without authority of and contrary to the state law, when, lo! and behold, it was determined that the action of the state officers was not only under the authority but in accordance with the state law. The trouble with counsel is that *they do not distinguish between an unlawful act, which has been upheld by the state court, and an unlawful act which has been declared by the state court to have been without authortiy of law.*

Another contention which may require the consideration of this court was put forth to the effect that the United States Circuit Court was without jurisdiction, for the reason that any action which could be brought for the impairment of a right guaranteed by the federal Constitution, where diversity of citizenship did not exist, must first be brought in the state court, there pursued to the Supreme Court of the state and the writ of error taken out under section 709 of the Revised Statutes of the United States, in the event that the controversy was determined adversely to the right claimed. This might be true in the event that congress had passed no legislation enforeing the guaranties of the fourteenth amendment. It having been decided that the authority given to congress is ample, and congress having acted upon that authority, and having assigned original jurisdiction to the United States Circuit Court without regard to citizenship, it seems to us as though this matter must fall to the ground of its own weight.

It was not claimed that there was any authority in point elsewhere, and it may not be claimed here, but it is said that certain decisions of this court, reasoning by analogy, tend to sustain our opponents' contention.

In United States vs. Cruikshank, 92 U. S., 542, the leading case heretofore relied upon by counsel, the whole proceeding

fell because of the fact that the matter complained of was of a private character, performed by private citizens against other private citizens, and therefore not within the protection of the Constitution at all. In other words, it was nothing more nor less than the ordinary case of a conspiracy by individuals to commit crimes against other individuals, and nobody would have ever pretended that there was any question of national import involved, but for the fact that the ones upon whom the offenses were to be perpetrated were of the lately emancipatd race.

In the case of United States vs. Harris, 106 U. S., 629, where section 5519 of the Revised Statutes of the United States was under consideration, the only question presented for the court was whether or not that section was unconstitutional within the meaning of any constitutional provision. The theory was that the statute under consideration was framed to protect from invasion, by private persons, the equal privileges and immunities under the laws of all persons and classes of persons. That theory being denied, it was insisted that the legislation found its warrant in the first and fifth sections of the fourteenth amendment, and since the statute itself was for the enforcement of private rights against private action it was unwarranted by the Constitution of the United States.

The distinction is so obvious that further analysis of that authority is not necessary.

Concluding, the court sa 1:

"As, therefore, the section of the law under consideration (to wit, section 5519) is directed exclusively against the action of private persons, *without reference to the laws of the state or their administration by her officers,* we are clear in the opinion that it is not warranted by any clause in the fourteenth amendment to the Constitution. * * *

"It was never supposed that the section under consideration conferred on congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the state, of which they were both residents, on all its citizens alike."

So, in the Civil Rights cases, Mr. Justice Bradley, in speaking of the state action which was inhibited by the fourteenth amendment, declares:

"It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment (that is to say, if the invasion was by one who was clothed with no official authority either judicial, executive, or legislative, either express or implied, or claimed, then such action was not within the terms of the amendment). It has a deeper and broader scope. It nullifies and makes void all state legislation, and *state action of every kind*, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be *brutem fulmen*, the last section of the amendment invests congress with the power to enforce it by appropriate legislation. To enforce what? *To enforce the prohibition.* To adopt appropriate legislation for correcting the effects of such prohibited state laws and *state acts* (What are state acts? Necessarily they are the acts of the judicial, the executive and the legislative officers of the states; not one or two, but all or any of them), and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. (Of course such authority did not give the congress the right to declare that every innkeeper must receive a negro on like terms with a white man, or that every stage coach or passenger car must allow a negro to ride in the same compartment of the same conveyance with white passengers, or that every owner of an opera house must allow negroes on equal terms to sit in that opera house with white people). * * * It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, *and the action of state officers, executive or judicial,* when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws *and state proceedings* affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated

upon such supposed state laws *and state proceedings*, and be directed to the correction of their operation and effect. * * *

"And so, in the present case, until some state law has been passed, *or some state action through its officers or agents has been taken*, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceedings under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws AND ACTS DONE UNDER STATE AUTHORITY. Of course legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws OR STATE ACTION OF SOME KIND, adverse to the rights of the citizen secured by the amendment. * * * In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt *or enforce*, and which, by the amendment, they are prohibited from making *or enforcing*, or such acts or proceedings as the states *may commit or take*, and which, by the amendment, they are prohibited from *committing or taking*."

It will serve no useful purpose to further analyze such cases as Logan vs. the United States, 144 U. S., 263, Hodges vs. the United States, 203 U. S., 1, and other cases of like character. They all proceed upon the distinction which exists between private action and state action. If a state can only act through its executive officers, then it is competent for congress to declare that such action, if in violation of the Constitution of the United States, subjects the offender, to wit, the agent through whom the state acts, to punishment.

We never recognized that the action of Governor Peabody and his subordinates was lawful until we were compelled to do so by the Supreme Court of the state, and even then, after reading the dissenting opinion, we entertain some doubts about it. But if that does not constitute state action, when it has received the sanction of the highest tribunal of the state so as to make Peabody and his subordinates punishable by the federal statute, enacted pursuant to the fourteenth amendment, pro-

vided such action, even though authorized by the state, is in contravention of the provisions of that amendment, then it would be hard indeed to say what action is prohibited by the fourteenth amendment.

We do not read the case of Carter vs. Greenhow, 114 U. S., page 317, as containing any authority for the defendants in error. A brief consideration of that case will suffice to sustain our views. The question presented by the record in that case was, whether the plaintiff, who had brought his action in the Circuit Court of the United States, pursuant to the sixteenth clause of section 629 of the Revised Statutes, basing his recovery upon section 1979 of the Revised Statutes, had brought himself within their provisions. Mr. Justice Matthews, speaking for the court, said:

"The acts charged against the defendant are that he refused to receive from the plaintiff the coupons tendered in payment of taxes, and thereafter proceeded to levy upon and take his property for the purpose of collecting such taxes in money. *The rights alleged to be violated are the rights to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent.* These rights the plaintiff derives from the contract with the state, contained in the act of March 28, 1879, and the bonds and coupons issued under its authority.

"*How and in what sense are these rights secured to him by the Constitution of the United States?* The answer is, by that provision, article I, section 10, which forbids any state to pass laws impairing the obligation of contracts. That constitutional provision so far as it can be said to confer upon, or secure to any person, any individual rights, does so only indirectly and incidentally (thus you will see the provisions of the fourteenth amendment were not involved at all). It forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the legislature of a state, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate *his rights under a contract*, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. *But of this right the plaintiff does not show that he has been deprived.* He has simply chosen not to resort to it. *The right to pay his taxes in cou-*

pons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution (as they would be if they fell under the fourteenth amendment), *and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia.*"

In such a case as that, of course the proceeding must be in the state courts, with a right to review in the Supreme Court of the United States, where the impairment clause of the Constitution is brought in question in the state courts.

It requires considerable hardihood upon the part of counsel, or anyone else, to cite the case of Carter vs. Greenhow as an authority which prevents a recovery for the high-handed and outrageous action which the defendants in error were guilty of under the allegations of this amended complaint.

It has been suggested that section 1979 was not intended to cover the deprivation of rights under color of a state Constitution, and whether the act was not purposely limited to inferior sources of the law. There are several answers to this suggestion. In the first place, if section 1979 did not exist at all the fourteenth amendment covers the deprivation of rights under the state Constitution, and the last section of that amendment gives authority to congress to carry it into effect, and if jurisdiction were given to the Circuit Courts of the United States to entertain jurisdiction as to such deprivations we could at least be heard in the United States Circuit Court for nominal damages in any event. In the second place, however, it was expressly decided in Giles vs. Harris, 189 U. S., 475-485, that notwithstanding it might be doubtful as to whether section 1979 covered the deprivation of rights under a state Constitution, nevertheless the court would and did hold that it did. In the third place, we not only allege that it was under color of the state Constitution, but under color of state laws, that the Supreme Court of Colorado decided that the governor was justified in proceeding as he did proceed.

We now proceed to a discussion of the opinion of Judge Lewis relative to the matter in hand.

The opinion of the court below, after giving a very fair statement of the situation as it appears by the pleadings and in the *habeas corpus* proceedings in the Supreme Court of the state of Colorado, proceeds to determine, if we understand it correctly, that on the face of the provisions of the Colorado Constitution and the statute of the state auhorizing the calling out of the national guard, there is nothing which contravenes the Constitution of the United States and the acts of congress made pursuant thereto. The position taken by the plaintiff in error is affirmed to this extent, that if state officers, in the exercise of their official authority, deny to any citizen the guaranties found in said amendment it is the state itself which does it, and such acts, therefore, come within the constitutional prohibition.

This, as it will be observed, is quoting the language of the opinion, from which position Judge Lewis draws the conclusion that the officer must claim to act under authority conferred upon him by the statute and be guilty of an abuse of power if the legislative act is not subject to the criticism. We agree with Judge Lewis as to what is expressed upon the face of the Colorado Constitution and the Session Laws of 1897 at page 204, which authorizes the governor to use the national guard to repel an invasion or suppress an insurrection; but where we disagree with Judge Lewis upon that branch of the case is, that, so far as the Colorado Constitution and the statutes are concerned, the Supreme Court has construed them to mean that the governor of the state of Colorado may, by the mere fulmination that a state of insurrection and rebellion exists or is threatened, arrest, detain and imprison any citizen of the United States until, in his good pleasure, he sees fit to declare himself satisfied. It is just this kind of action which this court has repeatedly passed on in tax cases and others of a kindred nature, cited supra, where the laws were fair on their face, but administered oppressively and in defiance of the Constitution. Judge Lewis no longer has the right to say that the Colorado Constitution means what it says. He is bound by the decision of the Supreme Court of the state of Colorado that it means something else; and it is upon that

meaning thus declared that we think he should have taken issue with the Supreme Court of the state of Colorado and have said that such a construction brings it within the inhibition of the fourteenth amendment, and therefore, to that extent, the Colorado Constitution, as construed, is void, and the state officers should be held responsible under the doctrine laid down by him in the opening paragraph of his opinion. He then declares that the power of self-preservation is, in effect, not only the first law of nature with respect to individuals, but to governments as well, and upon that postulate he proceeds to determine whether or not judicial tribunals can inquire into the question of whether or not such insurrection does exist. Having reached the conclusion that such determination rests with the political department of the government, it follows that the courts are bound thereby.

In our opinion the main question which is for consideration and determination here is not touched upon at all. Concede that the power to determine that a state of insurrection or rebellion exists is vested in the governor, where is the authority which allows it to follow as a matter of course that a citizen of the United States may be arrested and detained for a period of seventy-eight days, or for any other considerable time, without a warrant or without any process of law? Surely no authority is cited in the opinion which sustains any such doctrine.

It is admitted that the case of Luther vs. Borden would seem to be authority for an abuse of power upon the part of the executive officers of the state. In fact, the result of the demurrer was decided by the court below practically upon the authority of that case. He quotes a portion of it and emphasizes a part of the quotation (folio 133) as follows:

"And in that state of things the officers engaged in its military service might lawfully arrest anyone who, from the information before them, they had reasonable ground to believe was engaged in the insurrection."

Admit the right of arrest to exist, it does not follow that seventy-eight days of detention may occur, so that there is no authority in Luther vs. Borden for the statement of Judge Lewis (folio 133):

"So that, the plaintiff's arrest *and detention* was not dependent on his actual participation in the insurrection."

We have never contended that in the suppression of an insurrection that arrests might not be made without written warrant. We have contended, and we do now contend, that a conspiracy to make such an arrest and follow it with a detention depending upon the will of any individual, even though he were the president of the United States, is in direct contravention of the guaranties of the federal Constitution and every state Constitution which has ever been written. We have never contended that military officers would be liable civilly for an "unintentional" error. Our contention is here, as presented by this complaint, that there is no question relative to their action being error, and no contention with respect to its being intentional error. What the governor and his military subordinates undertook to do, in connection with the Citizens' Alliance of the town of Telluride, was to study and define the Constitution and the statutes of the state of Colorado, and then devise a scheme by which, as they thought, they could contravene the provisions of the fourteenth amendment to the Constitution of the United States. Of course, we recognize this principle, that the acts of every executive officer under the government will be presumed to be taken in good faith; but this presumption is only a presumption; it does not go to the extent of saying that they shall not be inquired into under any situation of facts that may exist, and such presumption could in no event overthrow the plain statements of the fourteenth amendment to the Constitution so as to deprive any citizen of the United States of the guaranties therein contained. Indeed, Judge Lewis seems to recognize our rights in this matter, for he says:

"Reasonable inquiry and care on their part under the circumstances as they then existed ought to relieve them from civil responsibility."

That statement begs the question. We charge that there was neither reasonable inquiry nor care on their part. We ask the determination of a jury upon that question as to

whether they reasonably inquired or reasonably cared as to the acts which they performed against the liberty of Mr. Moyer. If they were required at all to make any inquiry or exercise any care under the circumstances, or under any circumstances, then we have a right to the opinion of a jury upon that subject. *The inquiry of the jury is not to be directed to whether or not a state of insurrection existed as a political fact, nor for the purpose of determining any political question; the inquiry is directed to the proposition of whether or not Mr. Moyer's arrest without warrant, and detention without warrant, for a period of seventy-eight days, without judicial inquiry, was the exercise of a power which infringed any guaranty secured to him by the fourteenth amendment to the Constitution of the United States.* The opinion of the court and the argument of counsel would seem to be directed wholly to the proposition of whether or not the governor can declare that a state of insurrection and rebellion exists, and that if you concede to him the power to declare that state of insurrection and rebellion, you have then precluded the court from any inquiry as to what he may do while he is exercising his power to suppress the insurrection and rebellion thus declared. We deny that any such consequence follows as a result of the power of the governor of a state to declare insurrection and rebellion. A citizen of the United States does not cease to be a citizen because he is within territory declared to be in a state of insurrection and rebellion. The panoply of the Constitution of the United States exists at all times, in a state of war as well as in a state of peace. Its protection is the same; its guaranties are the same; there is no exigency provided for by it, and none can be construed into it suspending such guaranties. The question here deals with the liberty of Moyer, not with the power of the governor of the state of Colorado, either as a war governor or as a peace governor. It deals with his right, either as an individual or as a governor, to incarcerate any citizen of the United States under any conceivable set of circumstances, either devised by himself or otherwise. We say that the only justification that a governor can find, under such a state of facts as is presented in

this complaint, must be found under an answer in which he charges by allegation, and sustains by evidence, that there was no court within the insurrectionary district to whose keeping he could deliver this defendant, and before whom he could make a charge requiring him to answer for the supposed crimes which he was supposed to have committed.

That isn't the position of the governor at all. The complaint charges that the courts were in session; that they were carrying on their business; that they were uninterfered with by anybody, except in so far as the military had interfered with them in their proceedings against Moyer. The governor confesses by his demurrer that there was a court there. The Supreme Court of the state of Colorado recognizes the existence of such courts, and the transaction of business before them, but says that the governor has the power, and Judge Lewis agrees with that decision, to the extent of saying that a court having jurisdiction, with power to exercise that jurisdiction, with authority and ability to enforce its decrees and judgments, shall not exercise that power at all until, in the judgment of the governor, he shall allow it to do so. To make such a statement as that, either directly or in effect, or to allow it to be made, is to declare that the judiciary is dependent upon the will of the military; that they are not a co-ordinate branch of the government, supreme within the sphere of all questions requiring judicial cognizance, but that they are the mere satraps of the military arm of the government of the state. The courts can never be put in this position, in our judgment, by the opinion which will be rendered in this case by this court.

Again, Judge Lewis says that the situation must have been "more or less desperate and required prompt action, effective of the purpose."

That's just exactly what we want the jury to determine—whether the situation was more or less desperate. It is not for the court to usurp the functions of a jury when one alleges that his constitutional rights have been impaired. If the government officers can show that the situation was more desperate, and not really a trumped-up affair for the purpose of interfering with the liberty of the plaintiff in error, then it may be that

they can justify before the jury. If we can show that the situation was less desperate; that the courts were in the performance of their functions; that the armed conflict, which resulted in a declaration of insurrection and rebellion, was, as a matter of fact, what it was declared to be in the proclamation, nothing more than a threat on the part of those who were outside of the county to join forces with their friends in the county, and resist any attempts at their redeportation at the hands of the Citizens' Alliance, the merchants, the bankers, the liquor sellers and the gamblers, then we expect at the hands of the jury that the situation will be determined by the jury to be less desperate, and the liberty interfered with to have been under the protection of the Constitution.

If the position assumed by Judge Lewis on this branch of the case is good law, then he was indeed unfortunate in his illustrations and the cases cited to support them. He calls attention to the fact that:

"Measures are sometimes necessary under the police power that are severe, such as the *summary* destruction of property used for an unlawful purpose; such as the *summary* destruction of property to stay conflagration; such as the *summary* destruction of obscene books and diseased cattle; such as the restraint of personal liberty in passing either into or out of an infected district."

The emphasis placed by us upon the words summary used above shows at a glance the fallacy of Judge Lewis' position. If there was a conflict raging in Telluride, not a promised conflict, not a threatened conflict, to take place at some time in the future, and the military were engaged in quelling that conflict, no one will pretend that if Moyer was a participant therein, or aiding and abetting those who were participants, that he could not be summarily arrested without warrant. If a policeman sees two men engaged in a fight on the street, no one will pretend that he may not summarily arrest the participants and convey them to the county jail. If a fire is raging and a combustible building is directly in its path, no one will pretend that a fireman, or indeed anybody else, for that matter, may not summarily destroy such building. But we deny that the policeman, after

he has summarily arrested a participant in a fight, may put him in the county jail and keep him there for seventy-eight days, or any other number of days, or hours, or minutes, longer than is absolutely necessary to take him before a judicial officer. We deny that the fireman may proceed to put out the fire which is raging, and can then sit down for seventy-eight days and contemplate whether or not he will ruin the building which is in its path, which is combustible, and then arise and proceed to ruin it. We deny that the military may arrest even an insurrectionist, much less an aider and abettor of such insurrection, where there is no pretense that any armed conflict was actually raging, but only one which was threatened, and then sit down quietly for seventy-eight days, as a result of a declaration that insurrection and rebellion exists, and hold a citizen of the United States during that period of time without warrant or process of law, and eventually discharge him without making any complaint of any character or kind against him.

One of the strongest evidences which can be presented to show that the fourteenth amendment to the Constitution was violated within the meaning of the rules laid down by Judge Lewis, finding authority, as he says, in Luther vs. Borden, rests upon the fact that after seventy-eight days of detention Mr. Moyer was given his liberty, having at no time and in no place had a warrant of any kind or character sworn out against him, or any charge made against him, unless it be the inferential charge suggested in the return to the writ of *habeas corpus* in the Supreme Court of the state.

Judge Lewis says:

"The prohibitions found in the fourteenth amendment have never been construed to be an encroachment on such a *proper* exercise of that power."

Granted; that begs the whole question, at least so far as this amended complaint is concerned. The question of the *proper* exercise of the power is the only question involved here. Judge Lewis misapprehends our position if he says that we only

question the existence of the power, if he means by that the power of the governor to declare that a state of insurrection and rebellion exists. Nowhere, in all of the briefs which we have written upon this subject, or in any of the oral arguments that we have made, have we ever denied the power of the governor as an abstract proposition to declare that a state of insurrection and rebellion exists. We have illustratively charged elsewhere, and we do now charge here, that the governor can not lawfully declare a thing to exist which has no existence in fact, and we have further said that such a condition is the one which confronts us in this proceeding, in that, as a matter of fact, no rebellion or insurrection did exist within the boundaries of San Miguel county. We have not said that the judiciary could question such a declaration, either true or false, except in so far as it was necessary to determine the single proposition of whether or not the liberty of a citizen of the United States had been violated in contravention of the provisions of the Constitution.

Superficially considered, we can readily understand how, under the allegations of this complaint, one might conceive that an issue of fact is made upon the declaration of the governor, but any reasonable examination of the complaint ought to convince, and we think will convince, anyone that the issue is not made upon the declaration, nor upon the consequences which result from such declaration, but rather upon the power and authority of the governor, as a result of his declaration, to imprison anyone for any length of time further than is necessary to have the matter examined by a court, because of his naked declaration that a condition of insurrection and rebellion exists. Nor is it a matter of any force and effect that the Supreme Court of the state of Colorado either weighed or considered the situation in San Miguel county in the light of the constitutional provision and the principles of law controlling in such emergencies. Such an opinion might be persuasive upon the federal courts, but it can never be conclusive, because it is the paramount duty of the federal courts to construe and apply the provisions of the federal Constitution, and the acts of congress made pursuant thereto. The federal courts do not yield obe-

dience to the jurisdiction of the state courts, and it is no answer to a complaint predicated upon state action, to say that the state courts have examined and determined the question, where there is a federal constitutional provision involved. Where we differ with Judge Lewis, and where the case of Luther vs. Borden differs with him, arises from the condition presented.

In Luther vs. Borden the act of trespass committed upon the house of the plaintiff was done and completed in carrying out the suppression of the insurrection, just as the summary arrests and destruction of properties were done and completed in the cases cited. Those cases furnish no analogy, as we have already seen, for a military commander to arrest and detain on his unbridled will. Our meaning can be stated more clearly, probably, by reference to what we understand is meant by the term martial law.

In effect, both the Supreme Court of the state of Colorado, and Judge Lewis, have declared that if a governor asserts by proclamation that a state of insurrection and rebellion exists, that, *ipso facto*, results in martial law. We shall have occasion, later on in this brief, to say something about martial law. At this point, however, it will be sufficient for our purposes to declare, under the authority of Ex Parte Milligan, heretofore cited, that martial law is a condition. It is the absence of all law. It is a result of the dethronement of the civil power in the clash of arms. When a governor declares that a state of insurrection and rebellion exists, it does not follow that there is a clash of arms; it does not follow that the civil authorities are put out of business. Indeed, the proclamation of the governor in this very case negatives any such condition. The adjutant general is directed to proceed to the town of Telluride, in the county of San Miguel, and to aid the civil authorities in preventing acts of lawlessness, either by acting in conjunction with them or independently of them. He nowhere declares that the civil authorities are out of business; he nowhere authorizes the military to declare the courts closed, and the military nowhere attempt to exercise any such authority or make any such declaration except in so far as they disobeyed the writ of *habeas corpus* issued by his honor, Judge Stevens, sitting in the District Court in the very district of which San

Miguel county forms a part. Can it be urged, even though it be granted that a state of insurrection and rebellion existed, that the result of the governor's proclamation is to at once remove what vestige of authority there is left? There is but one duty which a governor has to perform in a state of insurrection and rebellion, and that is, to restore the civil authority at the earliest possible moment. If the courts are out of authority, it is his business to put them back. If the civil officers are unable to maintain order, it is his duty to assist them in restoring order. But this governor says, grant you there was no conflict raging in Telluride, but only one which was impending; grant you that all of the courts were in the exercise of their functions; grant you that there was only a threatened invasion, which it was feared would soon ripen into a conflict, I maintain, as a result of my declaration, that the civil authorities are thereby deprived and shorn of all power whatsoever until in my good pleasure I see fit to withdraw with my forces from the field upon which I have declared that there is no conflict existing, but only one which is threatened.

We have treated of Judge Lewis' opinion at this point because, at the end of his opinion, he denies that the federal court has jurisdiction. He also furnishes a certificate to this court that he sustains the demurrer purely upon the ground of a failure of jurisdiction. The two matters presented by the demurrer as to a lack of jurisdiction in the federal courts in a proper case, and the doctrine of *res adjudicata,* are evidently without merit, in the opinion of Judge Lewis. It is because, in his opinion, the complaint fails to state facts which establish a deprivation of liberty within the meaning of the fourteenth amendment, that he declares the Circuit Court to be without jurisdiction. From his reasoning, perhaps his opinion should more properly have been treated under that portion of this brief which will be devoted to a failure to state facts. But since the case, under repeated decisions of this court, is here for all purposes, and it being necessary to discuss this opinion somewhere, we have seen fit to discuss it here.

If the power thus declared by the Supreme Court of the state of Colorado, and followed by Judge Lewis, shall be found

to exist by this court, then a method has been devised by which at least a governor of the state can repeal a plain provision of the Constitution of the United States. If the governor of the state of Colorado can say to this court and to this plaintiff in error, as a result of my declaration, right or wrong, that a state of insurrection and rebellion exists, I may then imprison and detain you for seventy-eight days, without any complaint in writing or any warrant, that I may keep you incarcerated without taking you before any court, notwithstanding there is a court of competent jurisdiction which has cognizance of every kind or character of an offense which it is possible for you to commit; then, by the same token, he can keep incarcerated *any citizen* of the United States seventy-eight days, seven hundred and eighty days, or seventy-eight hundred days, or any other number of days whatsoever. It can not be that such a power is lodged anywhere. Arbitrary power has no existence and can have no existence in a free country. We maintain that the governor in the field, as well as in the capital, is bound by law, not such law as he sees fit to declare, not martial law, which is the absence of all law and has been so declared to be by this court in the Milligan case, but by the Constitution and the statutes of the state which created him a governor, and when he lays his hand upon a citizen of the United States he can only justify when he can show to a court that the detention was for the immediate purpose of taking him before a court and charging him with crime; or that, upon examination, he found no such court that the conflict was raging so that the ears of the court were closed, and that he was engaged in an actual, not an imaginary, conflict to restore that court, so that it could hear the charges which he or his subordinates had to prefer against those whom they had arrested in the course of the suppression of the conflict. To say that an *ipse dixit*, that a conflict exists, results in wiping out all law and substituteing therefor the high sounding phrase of martial law, which means no law at all, is to grant to a governor of a state an arbitrary power which no prince or potentate in the civilized world has the legal authority to exercise.

We close this branch of our argument, however, although certain phases of it will be adverted to hereafter, firm in the

conviction that this court must decide that the United States Circuit Court has jurisdiction of the cause of action which is stated in the amended complaint.

IS THE DECISION AND OPINION OF THE SUPREME COURT OF THE STATE OF COLORADO RES ADJUDICATA IN THE CASE AT BAR?

Were it not for the gravity of the matters involved, and the pertinacity and ability with which they have been discussed, we should be inclined to pass this ground of the demurrer either with silence or with secret risibility, or both. Let us proceed briefly to consider it.

Upon the construction of a state statute or a state Constitution the views of the Supreme Court of the state are all powerful. Upon the question of whether or not the state statute and the state Constitution, as thus construed, conflict with the Constitution of the United States or acts of congress made pursuant thereto, the action of the state court is of no binding force or effect upon any federal tribunal. In such case the federal tribunal must exercise an independent judgment.

> Yick Wo vs. Hopkins, 118 U. S., 356; 30 L. Ed., 220, and cases there cited.

The proceeding in the state court, the decision in which is said to be res adjudicata in this case, did not and could not involve any question of damages. And, therefore, even if it had not been in contravention of the Constitution and laws of the United States the doctrine of res adjudicata could not apply. This matter is set at rest by the case of Fayerweather vs. Ritch, 195 U. S., page 276; 49 L. Ed., page 193.

Mr. Justice Brewer rendered the opinion of the court, in which the following language was used:

"In Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581, we held that a judgment of a state court might be here reviewed if it operated to deprive a

party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (page 234, L. Ed., page 983, Sup. Ct. Rep., page 584):

"'But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: "Can a state make anything due process of law which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." Davidson vs. New Orleans, 96 U. S., 97, 102; 24 L. Ed., 616, 618. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings, inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment.'"

And again (page 236, L. Ed., page 985; Sup. Ct. Rep., page 584):

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

"If a judgment of a state court can be reviewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to) a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view

of the prohibitory language of the fifth amendment and thus involve the application of the Constitution."

In that case the contention was presented there, as here, that the action of the Supreme Court of the state was *res adjudicata*. Full effect was given to that contention in the federal court. On appeal to the Supreme Court of the United States the position taken was denied as a matter of law. Then follows a discussion of the leading case of Cromwell vs. County of Sac, 94 U. S., 351, showing exactly what can be decided and to what extent the decision of the state court is controlling. One of the essentials is that the claim or demand must be the same in one court as in the other. Another is that it must be between the same parties. The demand in the state court was that Moyer be liberated on habeas corpus. The defendants were not parties to that suit in any sense which enabled them to litigate any question whatsoever or to have it determined in their favor. The defendants here were simply said to be the custodians of the person of the plaintiff. As such custodians they were required to produce the plaintiff before the court and show cause, if any they had, as to why they detained him.

Abbott says in his law dictionary under the title of *Res Adjudicata:* To render matters once judicially decided in one proceeding *res adjudicata* as against parties to another proceeding. The following conditions must exist:

First. Identity in the thing sued for.

Second. Identity of the cause of action.

Third. Identity of persons and of parties to the action.

Fourth. Identity of the quality in the persons for or against whom the claim is made.

IF ANY ONE OF THESE CONDITIONS OF IDENTITY IS WANTING, THE FORMER ADJUDICATION IS MERE RES INTER ALIOS ACTO, AND HAS NO GREATER EFFECT THAN ANY OTHER TRANSACTION BETWEEN STRANGERS TO THE LATTER LITIGATION.

Here, there is no identity in the thing sued for.

Here, there is no identity of the cause of action.

Here, there is no identity of persons and of parties to the action.

Here, there is no identity of the quality in the persons for or against whom the claim is made.

Habeas corpus is the right to a writ by which a person attempts to secure his liberty from imprisonment. The only question involved is whether or not the body shall go at large. There can be no recovery had for its detention, whichever way the decision is rendered, and the result of such a decision is but *res inter alios acta* in any subsequent litigation. The decision has no force or effect except insofar as it appeals to the reason of this court. *It will be remembered, also, in this connection, that the complaint alleges a term of imprisonment to have existed long after the time when the opinion of the Supreme Court of the state was rendered.*

No matter what right the defendants may have had under the decision upon the day that it was rendered, if, *as is alleged, the body of the prisoner was thereafter subjected to humiliation and confinement in excess of that which was even allowed by that decision, a cause of action exists therefor.*

A private individual may sue where his rights are infringed, even if the act which infringes those rights was lawful in and of itself. In other words, where he has suffered a special and peculiar injury by reason of the performance of an act of a public officer, or its improper performance, if a duty with respect thereto was involved to himself as an individual, he may maintain his action for damages.

Am. & Eng. Enc. of L., volume 23, page 380, note 1.
Hartford Co. vs. Waterman, 26 Connecticut, 324.
State vs. Harris, 89 Ind., 363; 46 Am. Rep., 169.
Loudon vs. Ball, 93 Ind., 232.

In the absence of any statute to the contrary, we think we are safe in saying that no question of *res adjudicata* can ever be involved in a *habeas corpus* proceeding except in the case of children. For some reason, which it is not now material to inquire into, where a *habeas corpus* proceeding has determined the proper custody of a child as between the parties to

such proceeding, it has frequently been held that the matter could not be examined again. Of course, in a number of the states there are statutes to the effect that upon the identical state of facts there shall not be more than the number limited by statute of adjudications involving the detention of a prisoner. If we should assume, which we have not and do not, that the writ of *habeas corpus* was *res adjudicata* upon the question of Moyer's detention between himself and his captors acting in their official capacity, it would be no adjudication whatsoever when we sue them for the tort involved in the continued detention and for damages both compensatory and penal for the abuses complained of while that detention existed.

Suppose that a prisoner in the penitentiary should sue out a writ of *habeas corpus* to test the validity of the judgment under which the warden purported to hold him, and, suppose, the warden should plead that judgment and it should be determined that his right to hold the prisoner was valid. Suppose that, thereafter, the prisoner should bring a suit for being beaten, wounded and otherwise maltreated by the warden while he was so detained, and for a continued detention after the limitation of his sentence had expired. Would there be any doctrine of *res adjudicata* under any statute which has ever been drawn which would prevent the maintenance of the suit last mentioned?

The question of finality of a *habeas corpus* decision is treated of in a note following the case of Cormack vs. Marshall, in volume 1, Am. & Eng. Ann. Cases, at pages 256-260, the English, federal and state cases being cited in their order.

The exact question has been presented, which we have above illustrated, in the Supreme Court of the state of Massachusetts, where it was held that a judgment on a writ of *habeas corpus* remanding the prisoner was not a bar to a subsequent action by him for false imprisonment.

Bradley vs. Beetle, 153 Mass., 154; 26 N. E., 429.

See, also,

Castor vs. Bates, 127 Mich., 285; 86 N. W., 810; 89 Am. St. Rep., 471.

In re Quinn, 2 N. Y. App. Div., 103; 37 N. Y. Supp., 534.

The principle is also stated in the cases cited in Vol. 9 of the Encyc. of Pl. & Pr. at page 1070.

The Supreme Court of California, in the case of Rogers vs. Superior Court of the City and County of San Francisco, 145 Cal., 88; 78 Pac., 344, held, in a case where they had remanded a prisoner on *habeas corpus* who had sought a discharge from the judgment of the court below, that the denial constituted no bar to a re-examination of the question affecting the validity of the judgment on a writ of certiorari to review that judgment. In other words, the decision of the court itself upon the validity of the judgment in the *habeas corpus* proceeding was not a bar to another decision of the same court on the validity of the same judgment when questioned in a different way.

Thayer, late circuit judge, and Hook, then district (now circuit) judge, decided, in the Eighth judicial circuit, that the denial of a writ of habeas corpus by the federal courts of one circuit does not render the questions determined *res judicata* so as to preclude their re-examination by the courts of another circuit in subsequent *habeas corpus* proceedings instituted therein by the same petitioner.

Carter vs. McClaughry, 105 Fed. Rep., 614.

How much more would it have been true if the action in the second case were one given for false imprisonment, or for damages because of abuse while the imprisonment continued?

In In re Kopel, decided by District Judge Hough for the Southern district of New York, 148 Fed. Rep., 505, it was held that not only does the doctrine of *res judicata* not apply in matters of *habeas corpus*, but there being no federal statute limiting the common law right, a federal court may entertain

a petition, notwithstanding the denial of the same petition by a state court also having jurisdiction.

Under that case, which purports to be based upon ample authority, an application could have been made to the federal court for a writ of *habeas corpus* direct, notwithstanding the decision of the Supreme Court of the state of Colorado; and it may be that judicial notice of matters of public and general interest will be broad enough to inform this court that the petitioner in this case was discharged about five hours after a telegram had been received in Denver from St. Louis, on the 15th of July, 1904, that United States Circuit Judge Thayer, sitting in St. Louis, had issued a writ of *habeas corpus* to bring the body of Mr. Moyer before him on a day and at a time mentioned in the writ.

Let us now examine for a moment what we have been confronted with on this question.

In Robb vs. Connolly, 111 U. S., 624, no more was decided than that exclusive jurisdiction was not vested in the federal courts in habeas corpus questions. The question here presented was not raised at all.

Likewise, in Minnesota vs. Brundage, 180 U. S., 499, no more was decided than that one who was resting under conviction of a municipal court, and who had an appeal to the Supreme Court, should not be allowed, in the first instance, a writ of *habeas corpus* to test the validity of his imprisonment under that judgment, but the court below was charged with the duty of denying the writ without prejudice, so that an application might be renewed if the remedy should prove unavailing.

Of course the fundamental distinction should always be borne in mind, as applied to the case at bar, that we are not seeking our liberty on a writ of *habeas corpus* here; we are seeking to punish for the infringement of that liberty in violation of the Constitution—a matter which was not presented to the Supreme Court of the state of Colorado at all, so far as the question of punishment was concerned.

The case of The State of Arkansas vs. The Kansas & Texas Coal Co., 183 U. S., 185, has nothing to do with the doctrine of *habeas corpus* at all. Of course, we recognize that where the

federal courts and the state courts have concurrent jurisdiction, and that of the state court has been invoked in a given case, comity will require, and the decisions of this court will sustain, the federal courts in refraining from interfering until the case has gone from the trial court to the court of last resort in the state, and has been taken by writ of error from that court to this. That doctrine has nothing to do with a case like the one at bar.

Neither the case of Ex Parte Tong, 108 U. S., 556, nor the case of Cross vs. Burke, 146 U. S., 82, nor the case of State vs. Huegin, 110 Wis., 189, present any such question as is presented here.

In the first case the court below was in doubt about its jurisdiction, which depended upon whether or not a *habeas corpus* proceeding was civil or criminal. It was simply determined that a *habeas corpus* proceeding was a civil one, and, therefore, the Supreme Court of the United States could not take jurisdiction.

In the second case the only question involved was whether this court had jurisdiction over the Supreme Court of the District of Columbia in *habeas corpus* matters. The simple holding was that it did not. No other matter seems to have been discussed, and we see no applicability whatever to the case at bar.

In the Wisconsin case we do not find anything even bearing upon the matter in hand. All that is there held is that, under the laws of Wisconsin, a *habeas corpus* suit is *res adjudicata* as to the person charged with unlawfully restraining another of his liberty, unless it is reversed in some proper proceeding.

Indeed, counsel themselves appear to have concluded that there is not much in their suggestion of *res adjudicata,* because they have admitted elsewhere, and they are bound to admit here, that the great weight of authority, even if this were the precise question, is against them.

The contention of counsel does not gain much strength, it seems to us, by citing section 2110 of First Mills' Annotated Statutes. All that that section purports to cover is that when a party seeks a second writ of *habeas corpus* FOR BAIL, if it

has been determined in a former writ for bail that the offense with which he stands charged is not bailable, that finding shall be conclusive upon the second application.

We have some knowledge of the case of In Re Dowd, also relied upon by the defendant in error, reported in 133 Fed., page 747. It is one of the numerous cases, decided in the various reports of this section of the United States, wherein the writer of this brief waged the unsuccessful side of the controversy. The question there examined and determined, by one of the ablest judges who ever graced the bench of any court, simply was, so far as it affects the matter in hand, that there existed a discretion confided to the federal judge to either issue a writ of *habeas corpus*, or put the applicant to his writ of error, if he had one, from the state court to the Supreme Court of the United States. It was urged earnestly as a reason why the discretion should be exercised in favor of granting the writ that the term of imprisonment would have been fully served before this court could by any possibility determine the merits of the case. The fundamental fact upon which the case was presented did not appeal very much to Judge Sanborn, for the reason that the applicant was bound to confess that he had had a hearing before the Supreme Court of the state of Colorado, and that that court had found him guilty of the acts complained of. The sufficiency of the jurisdiction of the Supreme Court being the only matter in question, and the applicant, as a matter of fact, asking no rehearing or review of his acts, but only of the jurisdiction of the Supreme Court, it seems quite evident that Judge Sanborn took the view that, since he had a right to put him to his writ of error, and since he was guilty of the acts complained of, and since the jurisdiction of the Supreme Court of Colorado could be questioned by writ of error in the Supreme Court of the United States, the mere fact of imprisonment would not cause the discretion to be exercised so as to grant the writ prayed for. In this connection, also, permit us to say, that neither the case of Markuson vs. Boucher, 175 U. S., 184, nor In re Dowd, 133 Fed., 747, are authorities to sustain their contention, either on the plea of *res adjudicata* or the correlative proposition growing out of it, so much relied upon by counsel, namely, that a writ of error to

the Supreme Court of the state is the only remedy for a review of the opinion rendered by that court.

In the Markuson and Dowd cases, and all kindred cases, the defendant was resting under a conviction of some sort after having had his day in court. While being punished under the order of a court presumably having jurisdiction, he sought a writ of *habeas corpus* in the federal courts to review the validity of the judgment under which he stood incarcerated. Now, mark you, this court has never denied his right to sue out such a writ of *habeas corpus*. The most that it has held is that there is vested in the federal courts a right to put the party so suing out the writ of *habeas corpus* to his writ of error from the Supreme Court of the state, and that unless some extraordinary circumstances shall intervene, the peculiarities of which would result in working an extreme hardship upon the applicant for the writ, then the writ should be denied, and the party should be put to his writ of error. In all of those cases every presumption obtained that the action of the court below was regular because there had been a hearing in that court, and if any other rule should be held than the one which has been announced, the result would be that every judgment of imprisonment made by any court in the land would be subjected to a review on an application for a writ of *habeas corpus*, and that, too, before one judge sitting, it might be to review the action of an appellate tribunal. Of course, the writ of *habeas corpus* was never made for any such purpose as that. This case, if any case can, must clearly present the exception which was referred to in the Markuson and kindred cases. The writer of this brief urged upon Judge Sanborn that the Dowd case also constituted an exception, for the reason that the judgment there imposed was for a constructive contempt, something which was not within the purview of the authorities which are cited by Judge Sanborn as a reason for his refusal to grant the writ. But whether the Dowd case fell within or without the rule announced in the Markuson case, is a matter of no moment here, because if this case does not furnish a state of facts upon which the federal courts would take jurisdiction by virtue of a writ of *habeas corpus* if one had been applied for, then no case

in the world could ever do so. With most of these decisions before him, with a mind illumined with a knowledge of the law such as few men have ever possessed, it is a matter of contemporary history that the late Judge Thayer, of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, issued the writ in the identical incarceration complained of by Mr. Moyer, and as to which he had found no relief in the Supreme Court of the state.

Your attention is called, however, to the fact that whether this court would or would not have issued a writ of *habeas corpus,* which would, in effect, have reviewed the decision of the Supreme Court of the state of Colorado, *this is no application for a writ of habeas corpus, and no authority relative to the granting or denial of the writ could by any possibility be in point here.* This is an action for damages for the infringement of a right guaranteed by the Constitution of the United States, commencing before the decision of the Supreme Court of the state of Colorado, and continuing after the decision of the Supreme Court of Colorado, and the right to maintain this suit could not be denied, even though it should be held that the opinion of the Supreme Court could only be questioned by a writ of error. In other words, if the doctrine announced by that court, and the opinion therein pronounced, should remain untouched directly, the question then presents itself, as an independent proposition to this court, as to whether the detention of Mr. Moyer, after the rendition of the opinion of the Supreme Court, was in violation of his constitutional rights. There will be no attempt to disguise the fact, on our part, that we want and intend to have the force and effect of the opinion of the Supreme Court of the state of Colorado set aside, vacated and held for naught, as we conscientiously believe that it should be. But, in analyzing the legal proposition involved, Mr. Moyer has a right to complain of his detention without warrant, without process of law, without complaint under oath, at a time when the courts of the state of Colorado were in session, as it is conceded by this demurrer, under the privilege given to him to have that matter inquired into in the federal court. If, as an indirect result of that application, the doc-

trines announced by the Supreme Court of the state of Colorado shall come in conflict with the opinion to be rendered in this case, of course those doctrines will, in effect, be nullified, as we believe they ought to be. But, in any event, because a federal court has a discretionary right to deny an application for a writ of *habeas corpus* where the party applying therefor is suffering an imprisonment under a sentence of a state court, no reason thereby arises whatever for denying jurisdiction in a damage case arising under and by virtue of the impairment of a constitutional right and the act of congress passed pursuant thereto. It is the duty of a federal court, under the specific jurisdiction conferred upon it, to take original cognizance of a cause of this character. *There is no discretion vested in the court here to put anybody to a writ of error. The clause in question says that the federal court shall have jurisdiction for the deprivation of a right guaranteed by the Constitution,* AND IT IS NO ANSWER TO SAY THAT BECAUSE A STATE COURT MIGHT ENTERTAIN JURISDICTION WHICH COULD BE QUESTIONED BY WRIT OF ERROR, THAT, THEREFORE, THIS COURT CAN COMPEL ONE TO RESORT TO A WRIT OF ERROR, WHEN THE JURISDICTION OF THE FEDERAL COURTS HAS BEEN REGULARLY INVOKED UNDER A COMPELLING STATUTE. To so hold would be to immediately prepare another trap by which the constitutional guaranties under consideration could be evaded.

Take this case, for instance. The Supreme Court of the state of Colorado declared, as a consequence of a mere *ipse dixit* of the governor that a state of insurrection and rebellion existed in a certain county of the state of Colorado, that a citizen of the United States might be arrested by such governor and detained for any period of time whatsoever at the will of the governor.

Disguise it how we may, apply the word "temporary" to it, as the majority of the Supreme Court of Colorado was compelled to do, the result is that if a governor of the state of Colorado shall say that a state of insurrection and rebellion exists in any county of the state, then every person found in that

country, be he citizen of the United States or otherwise, holds his liberty at the will of the governor for any length of time that the governor shall see fit to keep in force this declaration. Eventually, such a prisoner, becoming tired of his imprisonment, no known cause being assigned therefor, makes an application to the Supreme Court of his state to be relieved, and he is informed that his *detention is but merely temporary, and therefore not unlawful.* He then goes by writ of error to the Supreme Court of the United States, as it is claimed should have been done by Mr. Moyer. At least one year and a half will elapse before the Supreme Court of the United States can hear the case on writ of error. When the day arrives for that hearing, be it sooner or later, the governor can liberate the prisoner, and such liberation being shown to the Supreme Court, no further proceeding can be taken in the case. This exact thing happened in the case of Feliz Barcelon from the Supreme Court of the Philippine Islands, hereinafter cited. A writ of *habeas corpus* deals only with the question of restraint of the body, and it is a complete answer to the writ at any time to say that the body is no longer restrained. The case then becomes a moot case, and, as such, is dismissed from the files of this court. Result: A citizen of the United States has been deprived of his liberty for a year and a half, or more, in violation of the guaranties contained in the fourteenth amendment to the Constitution.

Smarting under such deprivation, he goes to the United States Constitution and finds that express power has been given to congress to enact legislation enforcing these guaranties. He finds that congress has enacted, in section 1979, that he shall receive damages for such deprivation, enumerating as deprivations the very guaranties contained in the fourteenth amendment. By another clause of the same statute, later carried into the judiciary act, he finds that the Circuit Court of the United States is given original cognizance of his action for damages. He commences in the court so designated by the act of congress, and is at once confronted with the astounding proposition that since he had a technical but not an effectual or a real right to question by writ of error the opinion of the

Supreme Court which refused to liberate him, that the federal court is thereby deprived of jurisdiction to redress his grievance, for the reason that the very decision and opinion which he was seeking to question had been forestalled by his liberation prior to the time it could be heard.

Such a contention makes the liberty of a citizen of the United States a bauble and a plaything, instead of the most sacred right which was ever guaranteed by any instrument drawn by the hand of man.

It is not the duty of the courts to evade or to minimize, or to permit any scheme by which the guaranties of the fourteenth amendment can, by any engine divined by the ingenuity of man, result in a deprivation of the liberty of a citizen, either by declaring it to be a mere temporary detention, as was done by the Supreme Court of the state of Colorado, or by declining to take jurisdiction when congress has clearly conferred it, because it is possible under the Revised Statutes to question an opinion of the Supreme Court by writ of error.

The Supreme Court of Georgia, in the case of Perry vs. McLendon, 62 Ga., 598, decided on the fourth application for a writ of *habeas corpus* by the same parties upon the same state of facts that, since they had a right to have the final judgment in a *habeas corpus* proceeding *reviewed under the laws of the state of Georgia*, the determination of the writ somewhere along the line of the four decisions which had been rendered would be considered *res judicata*.

In the case of Miller vs. State, 43 Texas, 579, nothing more was decided than that an application for bail to the court below would not be interfered with because the appellate court had held on *habeas corpus* that the imprisonment was legal.

In Castor vs. Bates, 127 Mich., 285, no federal question being involved, a defendant had appeared in an application for a writ of *habeas corpus* where the plaintiff was held under two body executions, and had contested the discharge of the plaintiff, the application for the discharge being based upon the ground that the judgments were void. The defendant sought to set up the same question again in an action for false imprisonment, and it was held that, *because a statute provided that he might appear in that action and contest the discharge*

upon notice, and he having availed himself of that proceeding, he was estopped from again litigating the question of the validity of the discharge.

That case could only be held applicable in the case at bar provided there was statutory authority for the defendants to appear and contest the validity of the imprisonment of the plaintiff in error for the entire period of his confinement. There was no such determination in this proceeding. The sole question before the court was whether, at the time of the hearing, the defendants in error, as officers of the state of Colorado, were entitled to justify the arrest and detention of Moyer up to that moment, under the Constitution and laws of the state of Colorado. They *were not parties* to that proceeding; that was an *ex parte* proceeding. All the defendants had to do was to show the court by what authority they held him, and the court then proceeded to determine *ex parte* that the detention was lawful.

The defendants in this proceeding are sued in their own proper persons, and they come here to justify, and they seek to avoid justification, by showing that the Supreme Court of the state of Colorado in an *ex parte* proceeding decided that their detention of the plaintiff in error was legal *for a part of the time* that they held him. It lacks every element, it seems to us, of *res judicata.*

It appears from a later Wisconsin case, to wit, the case of State ex rel. Gaster vs. Whitcher, 117 Wis., 668, that both of the Wisconsin decisions are based *upon a statute of that state. There is no such statute in the state of Colorado.*

Finally, it is declared, in effect, that New Orleans vs. Citizens Bank, 167 U. S., 371, is the only statement of this court relating to the subject in hand on the doctrine of *res judicata.* That case simply holds that as to a question of the imposition of taxes under and by virtue of the same authority against the same person and the same property, that a litigation as to its validity for one year will determine it for subsequent years. This was but following, in effect, a line of decisions which has been rendered by this court, commencing, perhaps, with the case of Cromwell vs. Sac County, cited *supra*, that successive

coupons cut from municipal bonds were not capable of being successively litigated by the same party against the county issuing the bonds, where every question presented upon one of the coupons must necessarily be like the same questions presented upon any other of such coupons.

This closes what we have to say upon the doctrine of *res adjudicata* in this case.

FAILURE TO STATE FACTS.

It will be well, at the outset, in discussing this branch of the case, since it appeared to be controlling with the court below as per its opinion, if not as per its certificate, to call attention to the material charges contained in the amended complaint.

Under color of the laws of the state of Colorado, as embraced in its Constitution and its statutes, the plaintiff in error was imprisoned for seventy-eight days. That during that time he applied to the Supreme Court of the state of Colorado for a *habeas corpus* to test the validity of his imprisonment, but not the treatment which he received while in prison. That the defendants in error undertook to justify the detention solely under a declaration of the governor that a state of insurrection and rebellion existed in the locality where the plaintiff in error was found, and that, as a result of that declaration alone as to insurrection and rebellion, the Constitution and the statutes of the state of Colorado gave to the defendants the power to effect such arrest and to continue such detention. It is admitted that the plaintiff in error was not charged with the commission of any crime during such detention; that he was not charged in writing, under oath or affirmation, with any offense; that he was not allowed to appear against any charge in court, or defend himself either in person or by counsel; that neither the nature nor the cause of any accusation was set forth to him, nor were any made; that no witnesses confronted him face to face, or at all, nor did he have a speedy or public or any trial by an impartial or any jury either in the district where any offense was alleged to have been committed, nor was any

offense alleged to have been committed by him. That during all of the time that he was so arrested and detained courts of the state, which embraces all of them, were open and in the free and undisturbed administration of justice, except in so far as the defendants themselves prevented such courts from administering judicially the law of the state. He was not a member of the national guard, and that, during said imprisonment, he was compelled to stay in the city jail of Telluride, where it was damp and unwholesome and where his health became very much impaired. That during his period of restraint he was subjected by the defendants in error to hardships, privations, humiliations and disgrace, all in violation of his rights under the Constitution of the United States and the acts of congress made pursuant thereto.

If these facts are well pleaded, or any of them, the question arises, do they upon their face show a deprivation of rights and immunities secured by the Constitution of the United States?

Laying aside all questions as to the fourth, fifth and sixth amendments to the Constitution, for the reason that such guaranties may relate only to federal action, do these charges, on their face, bring the alleged acts within the category forbidden by the fourteenth amendment? If so, the complaint on its face states a cause of action, and jurisdiction can not be denied by reason of any such alleged failure.

We will first call attention to the authorities, which, in our judgment, give us the right to maintain this suit, and in so doing we shall quote an authority which existed prior to the statute under which this suit was brought, and which has been said to be simply declaratory of the law as it existed without the statute, in the case of Hemsley vs. Myers, cited supra.

In the case of Luther vs. Borden, 7 How., 1, 14, speaking upon the power of the state to proceed under martial law, it was said:

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

This case was much relied upon in the *habeas corpus* case decided by the Supreme Court of the state of Colorado, relative to the power of the state to declare the existence of an insurrection and to take summary means to suppress it. It has no applicability on that point and it has no applicability here for the reason that the conditions did not exist and were not declared to exist which authorized its consideration in respect to that matter. We quote it simply for the purpose of showing that wherever the right of the individual is infringed, it makes no difference who the officer is, nor what his claim of authority may be, the moment he steps beyond the bounds of that authority, or when he within the authority infringes the right of another, in executing the authority, he is liable in an independent proceeding instituted for that purpose. The doctrine is as old as the law itself.

United States vs. Lee, reported in 106 U. S., at page 196, is an instructive case on the point under discussion.

There were two writs of error sued out to the Circuit Court of the United States for the eastern district of Virginia. A suit had been brought in that court to recover possession of a parcel of land in the state court. It was removed by certiorari to the Circuit Court. The tract of land had been taken possession of by the United States as public property and was commonly known as Arlington cemetery. The attorney general of the United States came in with a suggestion that inasmuch as the property was in the possession of the United States, and had been for more than ten years, that the court was without jurisdiction to permit the suit to proceed.

Mr. Justice Miller delivered the opinion, in the course of which he said:

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or

artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." * * *

"It was this: The state of Ohio having levied a tax upon the branch of the Bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the state, was about to proceed to collect said tax by a seizure of the money of the bank in its vaults, and an amended bill alleged that he had so seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the treasurer of the state, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants as well as Osborn and his assistant, Harper.

"One of the objections pressed with pertinacity all through the case to the jurisdiction of the court was the conceded fact that the state of Ohio, though not made a defendant to the bill, was the real party in interest. That all the parties sued were her officers—her auditor, her treasurer and their agents—concerning acts done in their official character, and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction, and that the bill must be dismissed.

"A few citations from the opinion of Mr. Chief Justice Marshall will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case he says:

" 'If the state of Ohio could have been made a party defendant it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party can not be brought before the court, a suit can not be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say

that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit.'" * * *

"Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as a real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." * * *

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense can not be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed the court has before it a plaintiff capable of suing a defendant who has no personal exemption from suit, and a cause of action cognizable in the court—a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been

taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the president, have seized this estate and converted one part of it into a military fort and another into a cemetery.

"It is not pretended, as the case now stands, that the president had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property, without due process of law, or to take private property without just compensation.

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It can not be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See Ex Parte Milligan, 4 Wall., 2; Kilbourn vs. Thompson, 103 U. S., 168.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes

which have been passed by both branches of congress and approved by the president, to be unconstitutional; that the courts can not give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the president has ordered it, and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It can not be, then, that, when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here; I hold by order of the president, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which, by the Constitution, this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the secretary of war, which that officer had no more authority to make than the humblest private citizen."

In Hagood vs. Southern, 117 U. S., page 52, the Supreme Court took occasion to point out the distinction which exists in this class of cases.

Mr. Justice Matthews said:

"A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, WHILE CLAIMING TO ACT AS OFFICERS OF THE STATE, VIOLATE AND INVADE THE PERSONAL AND PROPERTY RIGHTS OF THE PLAINTIFFS, UNDER COLOR OF AUTHORITY, UNCONSTITUTIONAL AND VOID. Of such actions at law for re-

dress of the wrong, it was said by Mr. Justice Miller, in Cunningham vs. Macon & Brunswick Railroad Co., ubi sup.: *'In these cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.'* (Page 452.) Of such cases that of United States vs. Lee, 106 U. S., 196, is a conspicuous example, and it was upon this ground that the judgment in Poindexter vs. Greenhow, 114 U. S., 270, was rested."

Mr. Chief Justice Fuller, in Holt vs. Indiana Manufacturing Co., 176 U. S., page 68; 44 L. Ed., page 374, said, at page 71:

"The sixteenth clause of section 629 reads thus:

" 'Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.'

"Similar jurisdiction is conferred upon District Courts by the twelfth clause of section 563 of the Revised Statutes.

"Section 1979 of the Revised Statutes provides: 'Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

"All these provisions were brought forward from the act of April 20, 1871, entitled, 'An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes.' 17 Stat. at L., 13, Chap. 22.

"Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here.

"If state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect to the statutes of Indiana, *remedies are found in the first*

section of the act of August 13, 1888 (25 Stat. at L., 433, chapter 866), *giving to the Circuit Courts jurisdiction of all cases arising under the Constitution and laws of the United States;* and in section 709 of the Revised Statutes, which gives a review on writ of error to the judgments of the state courts whenever they sustain the validity of a state statute or of an authority exercised under a state, alleged to be repugnant to the Constitution or laws of the United States. Carter vs. Greenhow, 114 U. S., 317; 29 L. Ed., 202; 5 Sup. Ct. Rep., 928, 962; Pleasants vs. Greenhow, 114 U. S., 323; 29 L. Ed., 204; 5 Sup. Ct. Rep., 931, 963."

Jurisdiction was simply denied because the case did not fall within the act granting jurisdiction over infringement of patents, expressly pointing to these statutes here relied on had the case fallen within them.

In Giles vs. Harris, 189 U. S., 475; 47 L. Ed., page 909, Mr. Justice Holmes, delivering the opinion of the court in a case brought in the Circuit Court of the United States for the enforcement of the rights of a colored man under the fourteenth amendment to the Constitution and section 1979 of the Revised Statutes, said:

"We assume, further, for the purposes of decision, that section 1979 extends to a deprivation of rights under color of a state Constitution, although it might be argued with some force, that the enumeration of 'statute, ordinance, regulation, custom or usage' purposely is confined to inferior sources of law. *On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be affirmed on the ground that the subject-matter is wholly beyond the jurisdiction of the Circuit Court.* Smith vs. McKay, 161 U. S., 355, 358, 359; 40 L. Ed., 731; 16 Sup. Ct. Rep., 490."

The application being one for injunction, the right to maintain the bill was denied, because there was a remedy at law under the statute.

In this connection your attention is again called to the case of Tuchman vs. Welch, in 42 Fed. Rep., page 548, where it is declared in a case of this character that the statute under

which this suit is brought "throws wide open the doors of the federal courts as the altar of justice for his refuge."

In Hemsley vs. Myers, decided in 45 Fed., at page 283, the question arose in the class of cases which had been decided under the Kansas liquor law, including that of Tuchman vs. Welch, as to whether or not the relief was in equity or in a court of law, while it had been held below that the relief was in equity.

Judge Caldwell decided as follows:

"The contention of the counsel for the plaintiffs is that the statutes and rules of law which have been adverted to, and which, in the opinion of the court, preclude it from exercising jurisdiction in these cases, have been repealed and abrogated, either wholly or partially, by section 1979 of the Revised Statutes of the United States, first enacted as a part of the civil rights bill, April 20, 1871. And the learned judge who delivered the opinion of the court on the motion for a temporary injunction seems to entertain the same view. The section reads as follows:

" 'Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

"The provision in the section, as originally enacted, conferring jurisdiction on the District and the Circuit Courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction of those courts respectively. The section does not repeal, limit or restrict the previously existing rules affecting the relations of the state and the United States Courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. If the section was stricken out of the statute, the rights, privileges and immunities of the citizens under the Constitution and laws would remain to them, and the mode of seeking redress for a deprivation of these rights would be the same that it is now. The section declares that the mode of proceeding to obtain redress for a deprivation of these rights

shall be by 'an action at law, or a suit in equity, or other proper proceeding, for redress.' If the case is one which, under the well-understood rules of pleadings, is cognizable only of law, then an action at law is the 'proper proceeding for redress;' and if it is one cognizable only in equity, then a suit in equity is the 'proper proceeding for redress.' No new mode of proceeding is enacted, and no new right created by this section. As it now stands in the Revised Statutes, it may be properly denominated a 'declaratory' statute. And the statutes and rules of law defining and regulating the powers, relations and jurisdiction of the state and the United States courts with reference to each other are not affected by this section in the slightest degree. The demurrer to the bill is sustained, the temporary injunction dissolved, and the bill dismissed for want of equity."

Thus holding that as against the action of the state, a suit at law constituted the remedy. Relief, however, was denied solely because the federal courts had no power to enjoin proceedings in a state court.

See Aultman & Taylor Co. vs. Brumfield, 102 Fed. Rep., pages 7, 15.

If the alleged failure to state facts arises as it must, by reason of the official position of those who are said to have infringed the constitutional rights of the plaintiff, the case of

Marbury vs. Madison, found in 1 Curtis, at page 368, is in point.

We quote from page 383:

"The intimate political relation subsisting between the president of the United States and the heads of departments necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that, in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, *to decide on the rights of individuals,* not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

"But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control, *what is there in the exalted station of the officer which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?*

"*If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it can not be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?*

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president can not lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to

give a copy of such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

Poindexter vs. Greenhow, 114 U. S., 270, page 288.
In re Ayers, 123 U. S., 443, pages 506, 507.

In re Tiburcio Parrott, 1 Fed. Rep., page 481, page 520, where Judge Hoffman said:

"In view of recent events transpiring in the city of San Francisco, in anticipation of the passage of the statute now in question, which have become a part of the public history of the times, I deem it not inappropriate in this connection to call attention to the fact, of which many are probably unaware, that the statutes of the United States are not without provisions, both of a civil and criminal nature, framed and designed expressly to give effect to, and enforce that provision of, the fourteenth amendment to the national Constitution, which guarantees to every 'person'—which term, as we have seen, includes Chinese—'within the jurisdiction' of California 'the equal protection of the laws.' Section 1979 of the Revised Statutes provides a civil remedy for infractions of this amendment. It is as follows: 'Every person who, under the color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or proper proceeding for redress.'

"Thus a remedy for action is given to any 'person' against any other person who deprives him of 'any right, privilege or immunity,' secured to him by the Constitution, even if it is done 'under color of any statute, ordinance, regulation, custom or usage of the state.' Possibly the prisoner might have been liable had he, in pursuance of the mandate of the statute in question, and on that ground, discharged the Chinaman for whose employment he is now under arrest. But it is unnecessary to so determine now. AT ALL EVENTS, HE STOOD BETWEEN TWO STATUTES, AND HE WAS BOUND TO YIELD OBEDIENCE TO THAT WHICH IS SUPERIOR.

"Section 5510 makes a similar deprivation of rights under color of any statute, etc., a criminal offense, punishable by fine and imprisonment, and section 5519 provides that 'if two or more persons in any state * * * conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law, * * * each of such persons shall be punished by a fine of not less than $500, nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months, nor more than six years, or by both such fine and imprisonment.' THESE PROVISIONS OF THE UNITED STATES STATUTES—THE SUPREME LAW OF THE LAND—ARE COMMENDED TO THE CONSIDERATION OF ALL PERSONS WHO ARE DISPOSED TO GO FROM PLACE TO PLACE, AND, BY MEANS OF THREATS AND INTIMIDATIONS, ENDEAVOR TO COMPEL EMPLOYERS TO DISCHARGE PEACEABLE AND INDUSTRIOUS CHINAMEN ENGAGED IN THEIR SERVICE. There are other provisions, both civil and criminal, of a similar character, having the same end in view.

"Only a few days since the Supreme Court of the United States sustained an indictment, In Re Coles and The Commonwealth of Virginia, petitioners, on habeas corpus, against a county judge of Virginia, found under section 4 of the Civil Rights Act of 1875 (18 Stat., 336), for failing to summon colored citizens as jurors, 'on account of race and color.' The court held this act to be constitutional and valid under the fourteenth amendment, and that it deprived colored citizens of the equal protection of the laws. Thus it appears that congress, by the most stringent statutory provisions, has provided for the protection of all citizens and persons within the jurisdiction of the United States, in the full and complete enjoyment of the 'equal protection of the laws,' and of all 'privileges and immunities guaranteed,' by the fourteenth amendment, in all their phases, and that the highest judicial tribunal of the nation has deemed it its duty to give such statutory provisions the fullest and most complete effect."

This case, to all intents and purposes, is precisely analogous to the one at bar. There the officers of the state, under the express provisions of the state statute, had proceeded against the Chinaman, with the result that the Chinaman was incarcerated.

Judge Hoffman, in liberating him on habeas corpus, called attention to the rights of the Chinaman and to all other persons whose liberty was infringed under color of a state law, or a state Constitution, where the provisions of that law came in conflict with the Constitution and statutes of the United States.

That the complaint state facts sufficient to constitute a cause of action under these authorities can not be doubted. It sets up the fact of citizenship; the right of the plaintiff to be proceeded against according to law; the right to be charged with the commission of an offense, if he had committed one, under oath or affirmation; the right to be confronted with his witnesses face to face; the right to an impartial trial by a jury of his peers; the fact that the courts were in session for all purposes, except insofar as they were interfered with by the defendants themselves; the fact that he was incarcerated for a period of approximately three months, without any charge whatsoever being preferred against him, on the sole claim that it was the opinion of the defendants that it was a military necessity. Every position of the defendants in this case is absolutely disposed of in Ex Parte Milligan, 4 Wall., page 2, contrary to their contention.

No officer can escape liability for causing the arrest and imprisonment of a civilian who is not amenable to military law. The utmost that he can do in a state of war is to arrest such civilian and turn him over to the civil authorities, if the civil authorities are in operation; if not, he must be turned over to the civil authorities the minute that such authorities are in operation, and the first duty of the military is to see that the civil authorities are placed in operation.

McCall vs. McDowell, Deady, 233.

McCall vs. McDowell, 1 Abbott, 212.

Ex parte Merryman, Taney, 246; 9 Am. L. R., 524; 17 Fed. Cas., No. 9487.

Cochran & Thompson vs. Tucker, 3 Coldwell, 186.

Caperton vs. Martin, 4 W. Va., 138; 6 Am. Rep., 270.

In the case of McCall vs. McDowell, cited supra, Gen. McDowell was in charge of the military department at San Francisco. President Lincoln had been assassinated. Prior to his assassination he had, under authority of the act of congress, suspended the privilege of the writ of habeas corpus, and had authorized subordinate military officers to make arrests in such cases as their judgment warranted.

The plaintiff in the case used language expressing extreme satisfaction with the assassination of President Lincoln. By order of Mc Dowell he was arrested and sent to Alcatraz island, where he remained in prison several days with those who had been regularly convicted by military law. Upon his release he commenced a suit against Gen. McDowell for actual and vindictive damages. A verdict was rendered in his favor, and that verdict was sustained by Judge Deady in a remarkable opinion showing his extreme desire to have decided the other way, if the state of the law had permitted. Not only was the plaintiff allowed to recover damages, but those damages were allowed to be enhanced by reason of the fact that he was incarcerated in a common military prison with common convicts.

In Ex Parte Merryman, cited *supra*, Chief Justice Taney, sitting in the Circuit Court for the district of Maryland, declared that the president

"Is not empowered to arrest any one charged with an offense against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provide that no person 'shall be deprived of life, liberty or property without due process of law'—that is, judicial process.

"Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the Constitution immediately following the one above referred to (that is, the sixth article) provides that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the stae and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.'

"The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subbordination to judicial authority, assisting it to execute its process and enforce its judgments.

"With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, EXCEPT IN AID OF THE JUDICIAL POWER. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power, also, by arresting and imprisoning a *person without due process of law*.

"NOR CAN ANY ARGUMENT BE DRAWN FROM THE NATURE OF SOVEREIGNTY, OR THE NECESSITY OF GOVERNMENT, FOR SELF-DEFENSE IN TIMES OF TUMULT AND DANGER. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the Constitution, in express terms, provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

What becomes of the plain doctrine of self-defense as to states under this decision? We have heard much in a por-

tion of the public prints of the city and county of Denver, in their vain attempt to justify the decision in the Moyer *habeas corpus* case, as to the right of self-defense which a government has, and we have heard something of the higher law, as though there were some law relating to government other than that which is written in the Constitution and statutes, and in these later days something has been said and decided by the Supreme Court of Colorado about the law of inheritance from the King's bench. *But, if the president of the United States has not, and can not exercise the power which was claimed for him in the Merryman case, because it is forbidden by the Constitution, how much less can a governor and his military subordinates exercise a power which is* FORBIDDEN BY THE SAME CONSTITUTION?

There is no authority for an arrest and imprisonment except under due process of law, and due process of law is too well understood to be construed to mean that a man may be held for a period of three months before he shall be turned over to the civil authorities.

The same condition existed in the Merryman case that is set forth in the complaint here, as witnessed in the following language from the opinion:

"But the documents before me show that the military authority in this case has *gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituting a military government in its place, to be administered and executed by military officers.* For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. *Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, EXCEPT BY THE MILITARY AUTHORITY.* [Exactly what we allege.] *And if a military officer, or any other person, had reason to believe that the prisoner had committed any offense against the laws of the United States, it was his duty to give information of the fact and the*

evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and, upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

"Yet, under these circumstances, a military officer, stationed in Pennsylvania, *without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any), is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.*

"The Constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

"THESE GREAT AND FUNDAMENTAL LAWS, WHICH CONGRESS ITSELF COULD NOT SUSPEND, HAVE BEEN DISREGARDED AND SUSPENDED, LIKE THE WRIT OF HABEAS CORPUS, BY A MILITARY ORDER, SUPPORTED BY FORCE OF ARMS. SUCH IS THE CASE NOW BEFORE ME, AND I CAN ONLY SAY THAT IF THE AUTHORITY WHICH THE CONSTITUTION HAS CONFIDED TO THE JUDICIARY DEPARTMENT, AND JUDICIAL OFFICERS, MAY THUS, *UPON ANY PRETEXT OR UNDER ANY CIRCUMSTANCES*, BE USURPED BY THE MILITARY POWER, AT ITS DISCRE-

TION, THE PEOPLE OF THE UNITED STATES ARE NO LONGER LIVING UNDER A GOVERNMENT OF LAWS, BUT EVERY CITIZEN HOLDS LIFE, LIBERTY AND PROPERTY AT THE WILL AND PLEASURE OF THE ARMY OFFICER IN WHOSE MILITARY DISTRICT HE MAY HAPPEN TO BE FOUND."

How weak and puny is the majority opinion of the Supreme Court of the state of Colorado, in comparison with the ringing language just quoted. How vain any attempt upon the part of counsel to equal its force and clearness. What a contrast between such language as that which we have just read and the dissenting opinion of Mr. Justice Steele in the Supreme Court of the state of Colorado on the one hand and the majority opinion of the Supreme Court of the state of Colorado on the other. But we will not pause now to analyze the opinion of that court; we will do so at a later period in this brief.

Chief Justice Taney knew and realized that this was a government of laws and not of men. He knew that if the power claimed for the president then, and sought to be exercised by the governor here, was conceded, that this country from that moment ceased to be a government of laws and became the engine of a despotic individual who would only allow the laws to operate so long as they coincided either with his judgment or his pleasure. It is the supremacy of the law, and not of the individual, which must be maintained.

We have had an evidence of and an experience with the precise condition adverted to in the case so often cited, decided by this court, where it was suggested that a weak, wicked and depraved man might one day occupy the seat which had been filled by the reverenced Washington and the sainted Lincoln, and it behooves this court at this time, and all other courts when opportunity shall offer, to declare the supremacy of the law instead of the supremacy of the individual.

There is no escape from the conclusion that the decision of the Supreme Court of the state of Coloraodo is in direct violation of the principles announced by Chief Justice Taney in *Ex parte* Merryman.

In Cochran vs. Tucker, cited supra, an action for trespass and imprisonment was instituted and a verdict and judgment of $5,000 was awarded to the plaintiff.

The facts were these: A man who had been a member of the Union army was living concealed at his home in the state of Tennessee. Certain confederate officers, and soldiers accompanied by certain civilians, went to his house, in the dead of night, arrested him and threw him in prison. He commenced an action against them upon his liberation, and the defendants attempted to justify under the assertion of belligerent rights.

The Supreme Court of Tennessee said that there could be no such thing as martial law or belligerent rights as applied to the case at bar, for the reason that the plaintiff in the case was at the time of the arrest and imprisonment a civilian, and the courts were open and in the transaction of business, and the judgment of the lower court was affirmed.

In Caperton vs. Martin, cited supra, 4 W. Va., 138; 6 Am. Rep., 270, a confederate, provost marshal, acting in his official capacity, arrested the plaintiff and transported him to a military prison. The defendants interposed a plea of belligerent rights. A judgment for the plaintiff was affirmed. Upon a discussion of the whole doctrine, wherein the court shows the only authority which a military officer can have over a man who is not a member of the militia, is to arrest him and turn him over immediately to the civil authorities for the trial of any offense with which he stands charged.

The citations heretofore quoted upon another branch of this brief, from *Ex Parte Milligan*, are absolutely conclusive of this question. *An unlawful act can never be justified by the assertion of an unlawful authority or by the command of such an unlawful authority, and an authority is just as unlawful after it has received the sanction of the Supreme Court of the state as it was before, if it is inhibited by the Constitution of the United States, and the statutes made pursuant thereto.*

Little vs. Barreme, 2 Cranch, 170.

Christian County Court vs. Rankin, 87 Am. Dec., 505; 2 Duvall, 502.

Raymond vs. Thomas, 91 U. S., 712, page 716.

Beckwith vs. Bean, 98 U. S., 266.

Jones vs. Commonwealth, 1 Bush, 34; 89 Am. Dec., 605.

Wilson vs. Mackenzie, 42 Am. Dec., 51; 7 Hill, 95.

Witherspoon vs. Farmers' Bank, 87 Am. Dec., 503; 2 Duvall, 496.

Taylor vs. Jenkins, 88 Am. Dec., 773; 24 Arkansas, 337.

Farmer vs. Lewis, 89 Am. Dec., 610; 1 Bush, 66. (See extended note attached to this case.)

Ela vs. Smith, 66 Am. Dec., 356; 5 Gray, 121.

P. M. Riggs vs. The State, 3 Coldwell, 85; 91 Am. Dec., 272.

Eifort, etc., vs. Bevins, 64 Kentucky, 1 Bush, 460.

Mitchell vs. Harmony, 13 How., 115; 19 Curtis, 420.

The last cited case being the leading case on that subject.

If it shall be claimed that the power of the executive to determine the existence of a condition is binding upon this court, then we cite authorities to the following point:

That the executive can never, by determining a so-called political question, conclude the rights of either persons or property.

Little vs. Barreme, 2 Cranch, 170.

United States vs. Rauscher, 119 U. S., 407, page 418.

This is a position which we have been unable to make clear for reasons which we can not understand; that because the executive has the power and the right to determine the existence or non-existence of a political question, and because his determination of such political question is binding upon all other departments of the government; that it does not follow from such determination that he has any right whatsoever to interfere either with person or with property. The fact that the existence of a state of insurrection or rebellion is a political question does not lessen your rights nor mine under the Constitu-

tion of the United States or the acts of congress. The political determination that a rebellion or insurrection exists is binding upon the courts in questions as to whether or not such insurrection or rebellion does or does not exist, but it does not follow, as a consequence from that, that since the courts are bound to follow the political power in saying that an insurrection and rebellion does exist politically, if a governor of a state says so, that therefore the governor of a state may deprive a citizen of the United States of rights which are guaranteed to him by the Constitution, to wit, his personal liberty, unless such personal liberty be taken away in the manner provided by law. Shall we here repeat the definitions of due process? None of them have ever been defined to be so broad that the unbridled will of a military commander can, without charge of any kind or character, seize upon a civilian and proceed to administer punishment to him under the absurd statement that when he gets ready he will turn him over to the civil authorities to be dealt with in the ordinary course of civil administration.

Two of the judges of the Supreme Court of the state of Colorado were led away by the declaration of the governor that that was what he intended to do. This complaint shows that the governor there indulged in a statement which at least proved untrue, for it appears by this complaint that Moyer was discharged by the governor without ever being turned over at any time to any civil authority or any complaint being made against him. If the bloody conflict (in which no one lost his life) was raging so fiercely in San Miguel county that the governor did not have time to withdraw from the sanguinary fray for the purpose of making a complaint against Mr. Moyer during the time that the *habeas corpus* proceedings were pending before the Supreme Court, and if he promised the Supreme Court that just as soon as the gore could be washed from his blood-stained fingers he would present Mr. Moyer to the civil authorities and file a complaint with them, upon which an examination could be made of the awful offenses with which he proposed to charge him, and if an adjudication was had upon that premise, as it appears from the majority opinion, and if, after that was done, it was ascertained, as it appears by the complaint in

this case, that as a matter of fact there was no blood on his hands at all, that no conflict was actually raging, notwithstanding the political fact that a rebellion and insurrection existed, that no charge was or could be made against Moyer, as is now apparent, does not this, in and of itself, furnish evidence that, conceding all that the Supreme Court of the state of Colorado said to be true at the time that it made its statement, nevertheless the political question there involved has no position in the determination of this controversy, because a political question may be determined one way, while the invasion of a private right guaranteed by the Constitution of the United States may be determined in entirely another way. Mr. Moyer, in legal contemplation, has never been removed from the protecting folds of the fourteenth amendment. Can this court ignore the fact charged in this complaint, that, notwithstanding such legal contemplation, he has been deprived of its guaranties? As to him, up to this moment, the high-sounding phrases of the fourteenth amendment are worse than meaningless. They have carried the promise of hope to his ears. They have thus far left him in the slums of degradation and despair, and it is time for this court in this proceeding to vindicate that the fourteenth amendment is worthy of respect and contains the power which we have all heretofore supposed it to contain. It is not a set of meaningless phrases, for if any scheme can be found by which its provisions cease to operate for a single instant within the territory covered by the flag which represents it, both it and the flag will ultimately merit and doubtless receive the contempt which such weakness would warrant every freeman in bestowing. Happily, it is not so. The Constitution is the paramount law of this country, and its paramountcy has always been maintained by this court. First, the Constitution; second, the flag, which is its emblem, at all times and in all places, and everywhere the shield and the protection in war, as well as in peace, in famine, as well as in plenty, to the poor man, as well as the rich man, to the labor leader and the laborer, as well as to the capitalist, it is the cement which binds us all alike in love and fealty and patriotism to the most glorious government which, under the benign Providence of God, has ever

been allowed to fall upon the human race. It can only continue to receive love, veneration and respect when all the provisions of law have been construed as paramount as they were in the Milligan and in the Merryman cases. It can only receive contempt when those provisions are construed as they have been construed in the Boyle and the Moyer cases.

Right here it may be important to observe that the majority of the opinion of the Supreme Court does not decide that the governor of the state has power to declare martial law, because, it says, that question was not involved. There had been no attempt to declare it. The declaration that, as stated, insurrection exists, does not necessarily involve a declaration of martial law, and there was no pretense that the militia was authorized, under the governor's order, to do anything more than to restore such order as the citizens of Telluride had been deprived of at the time of such declaration. The only duty that the militia had, or could have, was to maintain the paramount authority of the civil power, and the Supreme Court decides by its majority opinion that it would not inquire into the subject of the powers of the governor, because the arrest and detention of Mr. Moyer, without warrant and without any written charge being made against him, was a mere temporary detention which would end as soon as he saw fit to turn his prisoner over to the civil authorities.

Hence the complaint does not deal with the subject of the powers of the governor. It deals with his infringement of the rights of the defendants, and for such infringement he is made responsible, under the fourteenth amendment to the Constitution and section 1979 of the Revised Statutes,

Perhaps we ought to say something about the peculiar language of section 1979. It provides that:

"'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects,' etc.," and some controversy may arise upon what is meant by the word 'color,' as used in the context of the statute.

The rights guaranteed by the Constitution are paramount. "Color," as used in this connection, must mean any device which is in contravention of the right so guaranteed.

The Supreme Court of Iowa took occasion to consider this word in a somewhat similar statute:

"The term 'color' means semblance, show, pretense, appearance, and implies, in the language of the law, that the thing to which it is applied has not the real character imputed to it."

C., R. I. & P. Ry. Co. vs. Allfree, 20 N. W., 779, 780; 64 Iowa, 500.

The Pennsylvania court said:

"Under color of," as used in Act Pa., 1889, section 20, declaring that street railway companies incorporated under certain acts, and any such company existing 'under color of' any charter or letters, upon accepting the provisions of this act, should become a body corporate thereunder, should be read as equivalent to the words "under authority of." The words often mean that the authority under color of which a thing is done is assumed or defective. "But their meaning, like that of all words not purely technical, must depend on the connection in which they stand, and the fixed character of the things to which they relate."

Berks County vs. Reading City Pass. Ry. Co., 31 Atl., 474, 475; 167 Pa., 102.

The North Carolina court said:

" 'Color,' in law, means, not the thing itself, but only an appearance thereof; 'as color of title' means only 'the appearance of title.' " That the expressions "by virtue of" and "under color of" mean very different things; for instance, the proper fees are received by 'virtue of the office;' extortion is under 'color of the office.' Any rightful act in office is by 'virtue of the office;' a wrongful act in office may be under 'color of the office.' "

Broughton vs. Haywood, 61 N. C., 377, page 383.

The Supreme Court of the United States said:

" 'Color of law' does not mean actual law. 'Color,' as a modifier in legal parlance, means 'appearance, as distinguished

from reality.' 'Color of law' means mere semblance of legal right."

McCain vs. City of Des Moines, 19 Sup. Ct., 644; 174 U. S., 168 (citing State vs. City of Des Moines, 96 Iowa, 521; 59 Am. St. Rep., 381).

But it is sought to overcome all this by an argument based upon the reserve powers of the states. What these powers are, are so well defined and so well understood, that we need enter into no analysis of them. It is claimed that the power here exercised is that of a police power. Let us examine the police power for a moment and see whether any distinction can be drawn between the use and abuse of such power. A quarrel takes place on the street; a policeman observes the participants; in the exercise of the police power he is not required to go before an officer and swear out a warrant before he can take the participants in that quarrel into custody and convey them to jail. Granted that he has the power to take and convey them to jail, and that it is a proper exercise of police power; he cannot detain them one single instant in that jail without making every reasonable effort to file his complaint before the proper magistrate. He must show, in order to justify that arrest so that he may escape an action for false imprisonment, that he made every reasonable effort, at the earliest possible moment, to lay the complaint before the magistrate. Such an arrest is justified under what is called the police power, for the reason that the exigencies of the situation do not permit the swearing out of a warrant; but when the falsity of the arrest is questioned, *the duty devolves upon the police officer to satisfy the court that the exigency did exist.* Could he justify, if he should go before the magistrate and declare that he saw a man walking upon the streets of the city, whom he had been told had threatened to resist the civil authorities, and that such a man was acting in conjunction with some man in another city with whom it had been agreed that at some future time he would appear in the same city and join forces to resist the civil authorities? Could he, under such circumstances, arrest the man so walking on the street, take him to jail, and detain

him for a period of seventy-eight days, and then say, as a justification under the police power, that he had reason to fear, and that he in good faith believed that this man, if he had not been arrested, would shortly join forces with another man to resist the civil authorities, and therefore he had taken him and incarcerated him for a period of seventy-eight days, so as to prevent him from joining such forces, and that it was his purpose, as soon as he became satisfied and convinced that he would not join forces with such other man, to turn him over to the civil authorities at that time and lodge a complaint against him for having conspired with this other man? The wildest flight of the imagination of the most insane lawyer who ever walked this earth would not claim that this was an exercise of the police power. And yet, it is practically just such a situation as this that we are confronted with, except that the parties are a little higher in the political scale. I said *political* scale.

The doctrine of self-preservation of *salus populi est suprema lex* is a seductive one, and, in the hands of able counsel, as is evidenced by the opinion of the Supreme Court of the state of Colorado, it is a dangerous one. No one will attempt to deny that government may preserve itself, but, under the declaration of such self-preservation, it is perfectly silly to either urge or declare that a power exists in the chief executive officer of a state to hold a citizen of the United States imprisoned for any length of time longer than that which is absolutely necessary to place him before a court having competent jurisdiction; and when such an imprisonment is called in question, the only way that an executive officer can justify is to declare that there was at the time and within the county no civil authority which had the power to entertain a complaint or to determine guilt or innocence. This governor demurs to a complaint which charges that the courts were in the full and plenary exercise of their power, except in so far as they were interfered with by the governor himself, and this governor admits that as a fact, and follows it with the astounding declaration that because he said that the county was in a state of insurrection and rebellion, it followed, as a necessary legal consequence, that no court could exercise jurisdiction except in so

far as he himself permitted such jurisdiction to be exercised, and he did not and would not allow it to be exercised in this case, as is shown by the record in the Supreme Court of Colorado. *The doctrine of self-preservation to this government depends upon its power to preserve the liberty of each and every citizen owing to it allegiance, and if that liberty can be interfered with by anything except the law administered in due course, this government has ceased to perform the functions to which it was consecrated by the fathers, and has become an instrument of absolutism and despotism containing within itself possibilities such as the world has never yet seen for the degradation and enslavement of the human race.*

In Luther vs. Borden, 7 How., 145, no one questioned the actual existence of an insurrection and rebellion. No one questions it here as a political matter. There the right to search private property and the commission of damage in so doing are the only questions under investigation. Suppose, to make the case parallel, the governmental forces in San Miguel county were engaged in an armed conflict with the imaginary insurrectionary forces in said county. During such conflict Moyer, as a bystander, had been struck by a rifle ball discharged from one of the muskets of the military. Everybody would concede that there could be no recovery. Suppose again, that during this armed conflict a house belonging to Moyer was in the path of the retreating insurgents, and that the officers honestly believed that some of the insurgents were taking shelter therein, and in their onward sweep they had broken down doors and windows in an attempt to enter that house and arrest these insurgents. Everybody will concede that there could be no recovery. But in each of those cases, if suit were brought, *the justification would be the overpowering military necessity which arose from the actual conflict of arms.*

It never was intended to be decided in that authority that any consequence flowed to the life or the liberty of a citizen as the *mere result of a declaration.* The consequences flowed from the *actual existing conditions,* and when those existing conditions were unquestioned, the further question of whether or not one or the other of the parties to the conflict was in the legal

right or the legal wrong with respect to it, could not be a judicial, but must always remain a political question. This authority, and those of a kindred nature, mean no more than that.

A sufficient answer to this class of authorities arises from the true construction as to what is meant by martial law. No better definition has ever been found than that given in the Milligan case, to the effect that it exists as a condition and not as the result of a pronunciamento. It is the absence of all law.

It would be a sufficient answer, however, in this case, to say that martial law was never declared and is particularly negatived by the allegations of the complaint. The fulmination of the governor that a state of insurrection and rebellion existed is not an attempt to declare martial law, nor a declaration of martial law. In fact, if we look to the averments of his proclamation on that subject we shall find that it had been represented to him that a condition existed which might result in the clash of arms (martial law is the clash of arms), and that civil authorities are unable, without aid, to cope with the situation. Fearful of that conflict, according to the terms of the declaration, giving it the broadest meaning in favor of the governor's position possible, he calls the military in the field to aid and assist the civil power, either by acting in conjunction with that civil power, or independently of it, as his erratic adjutant general might see fit. Under a proclamation like that, what's the use in talking about martial law? There's no claim of martial law anywhere except in an argument made to fit some other condition than the one which is before the court. We have never contended anywhere, and do not contend now, that martial law may not exist as a condition, and that when the proper conditions prevail the maxims *"inter arma silent leges"* and *"salus populi est suprema lex"* may not be applicable. What we do claim here is that this complaint shows, and the proclamation of the governor nowhere negatives, that such a condition does not exist. If it did, it would constitute the governor's justification for the arrest of the participants, and perhaps of anyone else whom he had reason to suspect, so long, and only so long, as the civil authority could not be heard in the din of conflict, which civil authority,

in such case, it would be his immediate duty to restore, and upon its restoration he could not justify for a single moment longer than was necessary a failure to make a charge against anyone who was supposed to have committed a crime.

This court cannot be misled by the interjection of any false issue, specious though it may be in the hands of astute counsel. No one in this case has ever denied the right to call out the militia to subdue insurrection or to repel invasion. No one disputes the authorities upon the existence of a war power at a time when the civil authorities are displaced. Counsel's authorities therefore are, so far as this case is concerned, upon that subject, directed to the demolition of a man of straw, which they have set up, claiming it to be the result of a proclamation from which no such consequence flows as is contended for.

It is said that the facts set up in the complaint do not furnish the basis of a cause of action, because to permit them to do so would be to strike a fatal blow at the sovereignty of the state. This sounds well, and it would be frightful in its consequences if such were the fact. Let us see.

The state delegated to the federal government the power to guarantee to a citizen of the United States liberty, except when the same should be infringed by due process of law. The state further delegated to the United States the power to enact means to carry that guarantee into effect by an act of congress. Congress acted pursuant to the power thus delegated to it by the state for the protection of the liberty of the citizen. The state therefore has shorn itself of the power to deprive any citizen of his liberty except by due process of law. Reduced to its last analysis, therefore, the defendants are compelled to take the position that the state has delegated to them the right to deprive this plaintiff in error of his liberty. But the state had already granted and delegated to the United States the power to remedy any deprivation of the liberty of the plaintiff in error, unless it was accompanied by due process of law. The defendants in error are, therefore, driven to justify the delegation of the authority which they attempted to exercise by showing that it is due process of law which has caused Mr. Moyer

to remain in jail for a period of seventy-eight days. How do they justify it? By saying that, as a result of a declaration by the governor that a state of insurrection and rebellion existed, it followed as a legal and necessary consequence to this plaintiff that he might be arrested without complaint, without warrant, incarcerated without a hearing, without being confronted by his witnesses face to face, or at all, without trial by jury, without the protection of any form of law, because, forsooth, the naked declaration of the governor served to suspend not only every statute of the state, but the Constitution of the state, the acts of congress of the United States, and the United States Constitution as well, during the pleasure of his excellency, the governor. A fig for such reasoning! There is no device by which a governor can temporarily repeal the Constitution of the United States or any law made pursuant thereto. A device has been found in Colorado, under the sanction of the Supreme Court, whereby its Constitution and its laws may be suspended at the will of a military dictator. That device we propose now and here to annihilate.

It does not follow because a governor is denied the power to imprison without complaint, or without warrant, or to detain at his pleasure, that civil government will fail or the federal plan prove a failure. It does follow that if the governor can for one single instant longer than is necessary to present to the civil authorities the question relative to the alleged commission of crime, arrest and imprison any citizen in the land, be he the rankest criminal who helps to form the lowest dregs of society, or the greatest criminal who stands at the head of the greatest law-breaking corporation in the world, or any one between the two, then this government is an absolute failure and its obsequies may as well be celebrated and its funeral oration be pronounced now as later.

We contradict counsel when they declare that the issues in this case depend upon whether or not a state of insurrection existed in the county of San Miguel, and that whether the arrest and detention of the plaintiff was necessary in suppressing that insurrection is a political question with which the courts have nothing to do. The governor, for purposes of his

own, may declare that a state of insurrection and rebellion exists. As a political question it cannot be inquired into; but, if he claims that, as a result of that political question so to be decided by him, and upon which the courts are precluded from inquiry, he can take a citizen of the United States and imprison him for seventy-eight days, then we deny that any such consequence shall flow from any such declaration. Again, we deny that there is any such question as to whether or not it is necessary or proper for the governor to arrest and detain the plaintiff in error as a necessary step, in his judgment, for the suppression of his insurrection and rebellion. He must find some other way to dispose of his insurrection and rebellion than by detaining a citizen of the United States for any period of time, when the courts are in session, longer than is necessary to place such a citizen on trial before the courts. Those are the questions which are to be decided in this case.

If the governor can show, on the trial of this cause, that there was no court sitting; that he was engaged in the arduous duty of restoring the courts to power; that he had a criminal charge against this defendant, and that he stood ready to make it before the first committing magistrate that he could find exercising authority; when that day and that time should arrive, the courts will decline to proceed further with this case. But they will never decline to proceed with it, in our judgment, upon a demurrer to a complaint which confesses that the courts were in existence and exercising their jurisdiction and all of it in the territory in which an insurrection and rebellion was said to exist. That's the main issue to be determined in this case.

A military commander might be excused for not leaving the battle array while the conflict was raging, but to enable him to say that because he has the political power to declare that a political condition exists that it necessarily results therefrom that that declaration serves to suspend all the laws of the state and the nation, and substitutes for those laws the law only of his will, is a position so absurd as not to require, it would seem to us, serious argument in this court. Indeed, it has never seemed to us as though it ought to require serious

argument anywhere, and yet two members out of three of the Supreme Court of the state of Colorado, have listened to the siren song of the governor and his satellites, and the judge of the District Court sitting at circuit in the federal tribunal has solemnly declared that this complaint does not state facts sufficient to constitute a cause of action because of the governor's declaration.

There is no fault to be found with the authority which declares that the existence of a state of war or a state of peace is a political question. There is considerable fault to be found with the proposition that a political question can impair the guaranty of the federal Constitution. None of the authorities which have been quoted by counsel touch upon this latter proposition.

It is not claimed that the governor is amenable to the judiciary for the manner in which he shall perform his constitutional duties. It is only claimed that he is amenable to the plaintiff for the deprivation of the liberty of the plaintiff without due process of law. He may perform his constitutional duties in any way that he pleases, so long as he conforms to the Constitution itself, and where a discretion has been given to him by that Constitution, he may adopt, in his discretion, any course which is permitted thereby within the limits prescribed, and in such case he will not be amenable to the courts or to any one else. But that is begging the entire question here.

He claims, as a result of his declaration of insurrection and rebellion, that no court has authority to inquire into his detention of any citizen of the United States. He claims that in such case it follows, as a necessary legal consequence, that his unbridled will is due process of law.

We present the issue whether there is, or ever can be, a condition of affairs brought about by any circumstances whatsoever, which will leave the liberty of one man, a citizen of the United States, at the unbridled will of another. If that liberty is interfered with, it must be interfered with by due process of law, and due process of law, whatever else it may mean, certainly does not mean at the unbridled will of another.

The nearest case which counsel seem to be able to find in support of the doctrines announced by them is that of Louisiana vs. Texas, 176 U. S., page 1. There was no question there involved of any protecting clause of the federal Constitution. One state was attempting to sue another state, because the officers of the other state were acting, as it was said, unjustly against the citizens of the plaintiff. The main question decided was that the Supreme Court of the United States did not have jurisdiction under the commerce clause of the Constitution, and that the maladministration of the laws of one state did not give to the citizens of another state the right to have the state sue for them with respect to such administration. The ostensible controversy arose out of the enforcement of a health regulation. The citation of such an authority ought to be sufficient to condemn the position taken by counsel on this branch of the case.

Counsel are attempting to have this court substitute for the issue of an interference with the liberty of the plaintiff in error without due process of law, a question which is not in the case, to wit, whether or not the federal government is authorized to interfere with the determination of a question which is political in its nature. Because this court is not authorized to interfere with a question which is political in its nature, it does not follow that it is not authorized to interefere with the effects claimed to flow from the determination of such a question, when they interfere with an immunity given by the Constitution of the United States. Indeed, this express question has been decided in a number of cases which are referred to by Mr. Justice White in the opinion delivered in Compagnie Francaise vs. The State Board of Health of Louisiana, 186 U. S., 380, wherein he says:

"For, while it may be a police power, in the sense that all provisions for the health, comfort and security of the citizens are police regulations and an exercise of the police power, it has been said *more than once in this court that even where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail.*"

Citing:

Gibbons vs. Ogden, 9 Wheat., 1, 210, 6 L. Ed. 23, 73.
Henderson vs. New York, 92 U. S., 259, 272.
Henderson vs. Wickham (same case), 23 L. Ed., 543.
New Orleans Gaslight Co. vs. Louisiana, Etc., Co., 115 U. S., 650-661, 29 L. Ed., 516.

This is another case which has been relied upon by both sides in this proceeding. It is cited by the defendants in error as a reason why courts will not interfere with the exercise of political power. The question was not there presented. The question was whether or not the police power could be exercised relative to matters which incidentally might embrace interstate commerce, and it was simply held that there was no intention upon the part of the states to part with the power to protect the health of their citizens, and that such regulations did not deprive one of his property without due process of law, notwithstanding the fact that the enforcement of such regulations might make it more expensive for one who is engaged in interstate commerce.

If there is any similarity or any conflict between the doctrine of that case and the one at bar with respect to those subjects, it is beyond our power of comprehension. The paramountcy of the federal Constitution was expressly asserted. It is the paramountcy of the federal Constitution which we are relying on here. Had the state of Louisiana attempted to declare that as a result of its police power it could take the goods carried by the Britannia and sell them and convert the proceeds to its own use without any process in court whatsoever, it would have been found that the authority of the federal Constitution would have embraced corrective measures to have prevented and punished any one making the attempt.

It is next contended that the governor of Colorado, having the power to determine the existence of a state of insurrection in a given locality in the state, may, as an incident thereto, determine what persons within the insurrectionary district are to be treated as aiders or abettors of such insurrection.

This high-sounding pronunciamento may be admitted in its entirety without affecting any question at issue here. Grant that the governor has the power to determine the existence of a state of insurrection and rebellion, and grant that he has the power to determine who are aiders and abettors. What is his his duty after he has made the determination? It is, if he has the opportunity, to take them before a tribunal having jurisdiction, and have them dealt with according to law. If, by reason of the *ris major,* there is no court to which he can make complaint, he may without warrant arrest and detain until he can find such a court, and his first duty is, if such a court cannot be found, to restore one to its functions, and then he must immediately lodge a complaint before that court. He has no power to hold anybody in military custody except under the conditions which we have stated.

Indeed, counsel come to the conclusion, at least for the purposes of argument, that no provision of the federal Constitution can be violated, because, if there exists a jurisdiction within the state, be it legislative, executive or judicial, then it is immaterial to the plaintiff in error which department of the government exercises that jurisdiction, and hence no guaranty of the federal instrument is violated. That is to say, the judiciary may act upon legislative matters; the legislature may pass judicially upon judicial matters, and the executive may usurp the functions of either, without violating the federal Constitution. *Suppose we concede all this to be true, neither the legislative, the judicial nor the executive can interfere with the liberty of any citizen without due process of law,* and if any branch attempts to exercise such power they become amenable to section 1979 of the Revised Statutes of the United States.

As we read the case of Dryer vs. Illinois, 187 U. S., 71, it means no more than this: that if the Constitution and statutes of a state prescribe that the governor should sit as presiding judge for the trial of those charged with crime, and should have in attendance upon him a jury which would, in the course of the trial, perform its usual functions, it would be a matter of entire indifference to the federal law. That is to say, how the various powers shall be exercised, and by whom, presents no

federal question within the meaning of the guaranties of the fourteenth amendment. In other words, a defendant in such case has had due process of law, because there is nothing in the federal Constitution or the acts of congress made pursuant to it, which prescribes that due process of law shall be exercised by certain individuals rather than others. To undertake to apply that case to the case at bar would beg the entire question which is here presented. Granted that the decision of the state court is supreme, and that it means all that is contended for it, namely, that the governor has the power to declare a state of insurrection and rebellion; that such declaration, as to its truth or falsity, cannot be inquired into; that, as a result of such declaration, *habeas corpus ipso facto* becomes suspended, not only the writ itself but the privileges thereof; that by reason of such facts the governor may, so far as state authority is concerned, imprison any citizen of the state and of the United States at his will and for a length of time that is satisfactory to himself; we are still confronted with this proposition: Do the words "due process of law" import some kind of a trial? If they do import that and nothing more, with or without a jury, then, it being conceded that there has been no trial at all in this cause of any kind or character, and that the length of the imprisonment was not regulated by the existence or non-existence of a tribunal before which the trial could take place, but was solely dependent upon the unbridled will of the governor, has the plaintiff in error been deprived of due process of law?

It is, of course, true that due process of law is not necessarily judicial process, as was said by Mr. Justice Brewer in the case of Reetz vs. Michigan, 188 U. S., page 503, but it has never been denied that process of some kind is required in order to deprive a person of his liberty.

It was said in the case of Hurtado vs. California, 110 U. S., 516, that notwithstanding the fact that a legal proceeding enforced by public authority might be sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general good, such proceeding, however sanctioned, whether new or old, *was to regard and preserve the*

fundamental principles of liberty and justice in order that it might be held to be due process or law.

If ther is any similarity between cases which proceed upon the determination of the right of an attorney to practice law, of a priest to perform the functions of his ghostly office, or of a tax assessor to levy taxes, or of a reviewing board to determine the nature and extent of such assessment, or any of the kindred cases which have been decided by this court, and the case at bar, we confess ourselves unable to either see or comprehend such similarity.

In the opinion by Mr. Justice Brewer, in the case just discussed, he recognized that it was essential in every judicial or quasi-judicial proceeding *that a hearing should be provided for.* Even in the case of a physician who was making an application to practice medicine, the board must hear and determine such application, and the fact that the board by statute had a stated time and place of meeting, which was held to be notice to every applicant, was the only thing which saved that case from a reversal.

Certain rules are stated by Mr. Justice Miller, in his dissenting opinion, in the case of Ex Parte Garland, 4 Wall., 333, which we think are entitled to receive consideration at the hands of this court. He says, speaking of several members of the Federalist, discussing the Constitution and the authors thereof:

"Nor was it less repugnant to their views of the security of personal rights that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment."

Seventy-eight days in prison constitutes punishment. That conclusion cannot be escaped. If there was law in Colorado authorizing the governor to inflict such punishment, *neither the nature nor extent of it were either prescribed or described by any such law.* So, we see that, *before the passage of the fourteenth amendment, it was necessary,* in order that a person might be made to serve punishment, that he should be given a hearing, and *that the nature and extent thereof,* should be defined by some public statute.

Mr. Justice Miller further said:

"A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence and inflicts no punishment—can in no sense be called a bill of attainder."

Let us paraphrase: A constitutional provision which authorizes a governor "to suppress insurrection and repel invasion" is a statute which designates no criminal, either by name or description, which declares no guilt, which pronounces no sentence, and under which a governor can inflict no punishment. The authority for any such punishment could only be found in the case at bar,

"in those elastic rules of construction which cramp the powers of the federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on congress to prevent traitors practicing in her courts, while in the other it is held to confer power on this court to nullify a provision of the Constitution of the state of Missouri relating to a qualification required of ministers of religion."

Who can doubt that the elasticity of the Constitution of the state of Colorado has been stretched by the Supreme Court decision of that state to the breaking point? Who can doubt that under other and different conditions the same provisions would have been contracted far beyond the situation for which we contend? But whatever the stretching or contracting qualities of the state Constitution may be, when those qualities are applied to a citizen of the United States they must meet with and square to the tests required by the fourteenth amendment. So that, without pursuing this line of authorities further, we think we may safely say that, notwithstanding the fact that judicial functions may be exercised by the legislative, the legislative may be exercised by the judicial, and both may be exercised by the executive, still in each, where the element of personal liberty is involved of a citizen of the United States, *there*

must be due process of law, which embraces at least a charge, a hearing and a sentence. None of these things appear in the case at bar.

In the court below a very considerable degree of attention was paid to what constitutes a state of insurrection, and an extended discussion was indulged in as to the elements and incidents, and the powers and duties arising therefrom. It was said there, and we presume that it will be said here, that such a discussion is not essential to a determination of this case. We will go further; we will agree with counsel that it is not only not essential, but that it is not even germane to any issue which was tendered, and whether the conclusions arrived at from such a discussion are or are not warranted, they are in no measure helpful to us here, unless counsel be appealing to the argument *ab inconvenienti*. Such an argument, if it can have weight anywhere, is of no force or effect if it be sought to use it as a stepping stone to avoid the guaranties contained in the federal Constitution. The federal Constitution does not deal with the inconveniences of government. It is absolute upon the subject upon which it speaks. It means what it says, or it means nothing at all, and if, forsooth, in a given case, counsel or others would like to have it stretched so as to cover an unlawful act, we feel satisfied that they will fail of their purpose in this court. Indeed, if the argument *ab inconvenienti* be appealed to, it will be found that the inconveniences arising from a lax construction of the Constitution will be greatly in excess of those which will occur if the Constitution be allowed to mean precisely and exactly what it says.

To use the language of Mr. Justice Lamar, speaking of the Colorado Constitution upon another subject, in the case of Lake County vs. Rollins, 130 U. S., 662, 670:

"Why not assume that the framers of the Constitution and the people who voted it into existence meant exactly what it says? At the first glance its reading produces no impression of doubt as to the meaning. It seems all-sufficiently plain, and in such case there is a well-settled rule which we must observe. The object of construction applied to a Constitution is to give effect to the intent of its framers and of the people in adopting it. This intent is to be found in the instrument itself, and

when the text of a constitutional provision is not ambiguous, courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

The argument here is that because the governor is given the power to call out the militia, to suppress insurrection or repel invasion, that a construction must be placed upon the federal Constitution that due process of law has been observed in arresting and detaining the prisoner for seventy-eight days without warrant and without trial, because, as an incident to the suppression of the insurrection, it is the personal opinion of the governor that it would be unsafe and unwise to turn the arrested party over to the civil authorities. If it be answered that the words due process of law require construction, then it need only be said that due process of law must be some process as applied to the party who is arrested. It does not mean due process of law by which the governor calls out the militia, or due process of law by which he suppresses an insurrection or repels an invasion. *It is due process for the prisoner himself, and as to this prisoner it is conceded that there has been no process except the unbridled will of the defendants in error.*

What difference does it make, then, how long we shall discuss the different conditions which may surround an alleged state of insurrection; whether it be ramified throughout an entire county or confined to a part of it; whether it is necessary that there should be bloodshed or otherwise? But if we take the charge of Judge Grosscup to the grand jury, in a case which has been heretofore adverted to, found in 62 Fed., 828, we will find even there that it is necessary that *such a force must be in existence that the civil authorities are inadequate to put them down, before any one is authorized to say that an insurrection exists.* We are not, however, discussing that question, because, as we view the case, we do not consider it of any importance. What we contend against is the conclusion which counsel draw from the authorities which they cite, and that is that *when a state of war or its legal equivalent exists, all civil law, whether constitutional or statutory, is superseded by*

martial law during the time and in the locality affected by the insurrection.

If that is the law, it certainly finds no sanction in the authorities which counsel have been able to quote. The rule, as we think it is to be derived from the Milligan and the Merryman cases, is that when a state of war exists, in the actual theatre of war, and while the conflict is raging, and the civil courts are overthrown by the superior power of such conflict, then there occurs a mere temporary interim during which the civil laws are temporarily not enforced. The civil laws at such a time are as binding upon the territory and the parties who are there engaged in conflict, as they are at any other time. There is no portion of the territory of the United States or of a state where the Constitution and the acts of congress are not in force at all times, although there may be temporary periods when they are not enforced. War does not repeal a law; it does not supersede a law, which is another name for the temporary repeal thereof. War is but the force which a state uses to enforce its laws. Martial law is a misnomer. It has been defined to be the absence of all law; but even that view is not strictly correct. Martial law is the power, usually in reserve, which arises when a state is attempting to enforce the civil laws, but is temporarily unable to do so until it abolishes a force existing in opposition to those laws.

Counsel argue, but the authorities do not support their conclusion, that a declaration of a governor that a state of insurrection and rebellion exists constitutes a temporary repeal of the Constitution of the United States, the acts of congress made pursuant thereto, the Constitution of the state and all of the state statutes, until, in the pleasure of the governor of a state he shall see fit to declare that these Constitutions and statutes have been restored.

There is another assumption which finds no sanction, in our judgment, in the federal authorities, and that is that a war which is being waged by a state under the power to suppress insurrection and rebellion is analogous in its force and effect to the War of the Rebellion or to a foreign war. In the latter cases the federal troops are waging war in *enemy terri-*

tory. That is not and never can be true as applied to a state. There is no such thing, and can be no such thing, as enemy territory within the boundaries of a state The state's powers are limited to suppressing insurrection and repelling invasion. A state, therefore, can not go into enemy territory. It may have enemies within its own territory, and it may annihilate those enemies if they shall attempt to resist the state military when called into the field, but it does not follow from this power of annihilation, when open resistance has occurred, that they may take one who is either engaged in open resistance, or one who is advising and encouraging open resistance, and, after having subdued him and made him powerless, incarcerate him for seventy-eight days without any charge being preferred against him, when the courts are open and in session, and his case can be laid before the courts at any time. The suspension of the law, for lack of a more accurate term, does not occur as the result of a declaration by the governor; it only occurs, as a matter of fact; and, in a case like the one at bar, the fact must be averred that the courts were not open, and there must be a trial of that question where an issue is tendered upon it.

When the federal government invaded the territory of the southern confederacy, there was a *de facto* government exercising authority with executive, legislative and judicial power. There was no court of any kind or character loyal to the government of the United States or loyal to a state of the United States, before whom any complaint could be lodged. The courts which were exercising such powers as were exercised were courts which were rendering their fealty to, and claiming their power from, a government which was in declared hostility to the government of the United States.

Suppose an insurrection exists in a given county in the state of Colorado under such a proclamation as we have here which avers that armed forces within the county are conferring with armed forces without the county, and it is afraid that they will join, since they are threatening to do so, within the county, for the purpose of resisting the civil authority. No claim or pretense in the proclamation that they have set up any other government, or that the courts existing in San Miguel

county are rendering fealty to, and claiming to derive their authority from, any force or power other than that derived from the Constitution and the statutes of the state of Colorado governing the governor as well as themselves. What an absurdity it is, under such a proclamation as that, to attempt to draw any analogy between the situation of citizens of the United States within the territory of San Miguel county and those who had renounced their allegiance to the United States and were living in the confederate states under the confederate government in the war of the late rebellion.

There is no escape from the position to which counsel are driven if their contention shall be found to be good law, and that is, that a citizen of the United States ceases to be a citizen to all intents and purposes, and the Constitution of the United States is repealed for all purposes and for a time resting in the discretion of the governor of a state whenever he sees fit to declare that any portion or all of his state is in a state of insurrection or rebellion. Indeed, counsel have said that the logical inference which they deduce from the authorities is that when a state of insurrection is declared in a given county, the inhabitants of that county are to be treated and regarded as insurgents, and until the insurrection is suppressed and so declared, and as to the truth of which declaration no one can inquire into, the courts of justice of the state can be lawfully closed against the inhabitants residing within such insurgent territory. This we absolutely deny. If the courts of justice are closed, it is because of the existence of an actual condition of war. The first and only duty of the governor in connection with that matter is to restore those courts to the exercise of their power. If he kills anybody in doing so, or if he imprisons anybody in doing so, he can justify, but unless he can show that the courts are not in power, and that he is attempting to put them back in power, he cannot justify as against the Constitution of the United States, when he interferes with the liberty of any citizen thereof.

But counsel say, as a reason why the governor should be construed to have this power, that a district judge might go through the mere formality of holding court, and assume to

transact judicial business; that if such fact existed it would be no criterion of the validity of the act of the governor in declaring such county to be in a state of insurrection. We grant that proposition. The governor unquestionably has the power, rightly or wrongly, to declare a state of insurrection or rebellion, but unless he can answer that a court is either not transacting business at all, or else that the transaction is a mere formality, he is unauthorized to interfere with the liberty of a citizen of the United States, and if the courts are out of business by reason of the turbulent state of the community, he cannot retain the custody of a citizen of the United States for a period of seventy-eight days, or any other time longer than is necessary to lay the complaint before the courts, unless he can show that he was at the very moment engaged in attempting to restore the courts in the exercise of their respective jurisdictions.

So, in referring to In re Kemp, 16 Wisconsin, 382, and kindred cases, it devolves upon the governor to assert, and to justify the assertion, that the civil magistrates were disloyal and insurrectionry.

Under the Milligan case, it rests upon the governor to show that the civil courts were wholly incompetent to punish, with adequate promptitude and certainty, the guilty conspirators. It devolves upon the governor to show that the judges and marshals of the court are in active sympathy with the insurgents. This can only be done under an answer. Certainly not by demurring to a complaint which states that none of these conditions exist, and which are only claimed to exist as a "legal sequence," as counsel has elsewhere termed it.

In the Milligan case it was said that

"Martial rule can never exist where courts are open and in the proper and unobstructed exercise of their jurisdiction."

It is martial law which is claimed to exist here as a result of the governor's proclamation. It can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is not only essential that they should be open, but they should be in the proper and unobstructed exercise of their jurisdiction, and the averments of this complaint

are that the courts were open; that they were transacting their business, and that they were in the proper and unobstructed exercise of their jurisdiction, except in so far as the respondents in error themselves were responsible for an interference with the jurisdiction, and what that interference was is shown in the habeas corpus proceedings which took place before the judge of the identical district in which San Miguel county is located. If martial law can never exist where courts are open and in the proper and unobstructed exercise of their jurisdiction, and if the governor in this case is claiming that as a result of his declaration that martial law was a necessary sequence, and if this court has declared that martial law is a condition and does not arise from a fulmination or proclamation of any kind, and if it is averred that the courts were in the proper and unobstructed exercise of their jurisdiction, then it devolves upon the governor to show, under an answer which avers that the courts in San Miguel county were neither in the exercise or a proper nor unobstructed jurisdiction, the existence of such alleged facts. There is no other way of determining it. There is no tribunal on earth who can question the arbitrary acts of this governor in any other way. What the Supreme Court of Colorado should have said, in order to carry out counsel's contention, would have been that if a governor of a state declares a state of insurrection and rebellion to exist, thereupon the courts within the territory so declared are thereby obstructed and deprived of the right to exercise their jurisdiction, and so long as such proclamation shall continue, the Constitution and statutes of the United States and of the state are alike temporarily repealed. We tender the issue of the proper and unobstructed exercise of jurisdiction, and it is no answer to say that because there might be a condition which would permit the formal opening and closing of courts, and the perfunctory exercise of judicial functions, that therefore the courts were not open. Let the allegation be made by these respondents, and we will gladly meet them with the proof.

Bishop, in his work on Criminal Law, volume 1, section 52, treating of the elasticity of martial law, declared, in effect, that martial law and the civil law might march together side by side

and martial law might be applicable to certain conditions existing in the identical territory where the courts were engaged in the exercise of their functions, but Bishop never said that where such courts were engaged in the exercise of any of their functions that a citizen of the United States could be arrested and held by the military until, in the judgment of the military, they were ready to turn him over to the civil authorities.

We do not suppose much force will be attached to any war orders which were approved by President Lincoln. He claimed to have the authority to suspend the privileges of the writ of habeas corpus, and his attorney general, Horace Binney of Philadelphia, Professor Parker of Cambridge, Reverdy Johnson and a large number of others supported him in the claim that he had such power. But never in his time was it ever decided, except by Judge Smalley, in the case of Ex Parte Field, 5 Blatch., 63, that Mr. Lincoln, as president of the United States, had such power. On the contrary, every court before which the question came decided the other way until the Supreme Court of Idaho had occasion to touch this question in the labor troubles occurring in that state, which was followed by the Supreme Court of the state of Colorado in the labor troubles occurring in that state. All of these decisions will be presently analyzed.

It is true that courts may be open and yet witnesses may be terrorized from testifying to the truth in cases of criminal accusations against the insurgents. It is true that justice may not dare to render an honest and unbiased verdict. It is true that the local judges may personally be tainted with a spirit of disloyalty or insurrection, and it may also be true that where these or kindred conditions exist that the law will regard the substance and not the form, and declare that judges will not be permitted, any more than non-official individuals, to aid and abet insurrection, either through fear upon the one hand, or actual disloyalty to the laws upon the other. But it does not follow that either the power or the sole power to decide these questions rests with the governor of the state as a result of his proclamation that a state of insurrection and rebellion exists, or that the governor himself may not be guilty of every

one of these charges instead of the courts. He cannot alter the facts, nor jeopardize, by any recitation with respect to them, a sacred right guaranteed to every citizen of the United States by the Constitution.

While the court in the Milligan case was entitled to take judicial knowledge of the condition of affairs in Indiana, it is not pretended that the Supreme Court of Colorado took judicial notice of the condition of affairs in San Miguel county. If it had, it is not pretended that it could come to the conclusion that the courts were closed, and it is not true that the Circuit Court of the United States either twice, or at all, took judicial notice of the fact that a state of insurrection existed in San Miguel county, Colorado. The Parker case did not arise in San Miguel county. It arose in Teller county, a distance of more than half way across the state from San Miguel county. The court did not take judicial notice in that case that a state of insurrection and rebellion existed. The writ was not denied for that reason, or, rather, the privilege thereof; and it is not true that in this case the court below has taken judicial notice that a state of insurrection or rebellion existed. There is not a word in the decision which justifies any such statement by counsel. There is not a word in the decision or opinion rendered by the Supreme Court of Colorado that it took judicial notice that a state of insurrection or rebellion existed. The most that can be claimed for any of those decisions is that the court held that it was a political question as to the existence of a state of insurrection or rebellion, and that, it having been decided by the political power of the state, the judicial power was obliged to follow it, and there the court stopped. All of these decisions proceeded upon a proposition which was nowhere denied. *What we denied was the claimed consequences resulting from the decision of the political power.* The trouble with this whole line of argument is that it begs the question. No one is attempting to determine whether a state of insurrection or rebellion existed. We are simply attempting to determine whether or not that state of insurrection and rebellion declared to exist, for purposes which were well known to every citizen of Colorado, when as a matter of fact

it did not exist at all, was accompanied by circumstances which excused the governor for holding the plaintiff in error under arrest, without complaint and imprisonment, without warrant. This conditon, we claim, he must aver and prove.

Looking to the case of Jones vs. United States, 137 U. S., page 202, where a question of jurisdiction arose over an island from which guano was being taken, we find that nothing more was decided than that the court would take judicial notice of a communication promulgated through the state department from the president, to the effect that the island was under the sovereignty of the United States, notwithstanding an averment to the contrary. Under the authority of that decision an issuable fact could not be predicated upon a thing which was historically untrue, and as to which the courts were bound to take judicial notice.

As applied to the case at bar, in the widest latitude that could be claimed for it, it would mean no more than that the question of whether a state of rebellion and insurrection existed in the county of San Miguel could not be inquired into, but the question of whether courts were open or closed in that county would be quite another matter, and where the liberty of a citizen was said to be infringed because of his being held without complaint or warrant, it would make no difference whether the county was in a state of insurrection or rebellion or otherwise. The matter at issue would be whether or not there was a court that could hear any complaint as to any offense with which he might be charged.

It is not pretended that the motives of the governor can be inquired into in this proceeding so far as his declaration is concerned that a state of insurrection and rebellion existed. So far as his imprisonment of Moyer is concerned, which is the thing brought to the attention of the United States Circuit Court. THERE IS NO REASON WHY WE CAN NOT INQUIRE INTO HIS MOTIVES AND PROBE HIS ACTIONS.

But it is said that we have urged that the power which was confided to the governor might be abused, and therefore that it ought to be held that such power did not exist. This is another man of straw, which never had any foundation in fact. In a

case where it is doubtful whether power has been granted or not, it may properly be urged that because such power may be abused, therefore the language should be construed so as not to hold that it grants it. But no one has ever contended that where a power is unquestionably granted that, because it may be abused, therefore it should be construed not to exist. Certainly we never have; and so we shall not take any time to discuss counsel's argument upon that head. It is of a piece with a large amount of other matter that we have been confronted with, upon the theory, we suppose, that the discussion of a feigned issue which counsel can fortify themselves with authority upon, will obscure or destroy the real issue presented.

We think the true doctrine of all of these cases relative to the restraint of personal liberty or of the compulsory submission to some police regulation is summed up by Mr. Justice Miller in his Lectures on the Constitution, where he says:

"The president or the executive officer may order a man into imprisonment, provided the *necessity* of the case warrants such action, but in all these cases *they are bound to be careful to exercise their power within the law.*"

Who is to be the judge of the necessities of the case? How are they bound to be careful to exercise their power within the law? What do the words "within the law" mean? The answer of opposing counsel is that the governor is a law unto himself, and that no one can inquire into any of his acts, provided that he once fulminates on the proposition that a state of insurrection and rebellion exists. Counsel say, in the case at bar, it is not alleged that the defendants assumed to try, convict or punish the plaintiff. They are right to this extent: We do not allege that they either assumed to try or convict the plaintiff. They are wrong to this extent: We do charge that they punished the plaintiff, and it is because they did not try him, and because they did not convict him, that we object to their punishing him. Counsel say that the defendants in error did but hold the plaintiff in error in military custody for a reasonable period, as a measure which, in their final judgment, was essential for the public safety. We contend that they have not the

power to say what this reasonable period is. We contend that when we aver that after holding the plaintiff in error seventy-eight days they discharged him without any complaint of any kind or character, and they demur to it, thereby confessing the truth of the statement, they give the lie to their own answer in the Supreme Court of the state of Colorado, where they declared that it was their purpose to turn him over to the civil authorities, and they refute their entire argument when they declare to this court that such a period was a reasonable one. We deny their right to determine the question of what is reasonable. If they can justify this detention as reasonable, under all of the circumstances which surround the various transactions that took place in San Miguel county, as a result of the governor's declaration of insurrection and rebellion, it may be that a jury will excuse them.

When the governor acts, as it is claimed here that he did act, he becomes *a person* within the meaning of section 1979. When he acts by color of his office he is nevertheless a person. When he acts in violation of the guaranties of the fourteenth amendment, claiming to do so as an officer of the government, he is nevertheless responsible as a person. Authorities, therefore, upon the question of the right to inquire into the motives of the governor for any of his official acts, are of no moment in a case like the one at bar. The governor is stripped of his official character for the purposes of the judgment to be rendered in this case, and, being so stripped of them, he is, like any other person, answerable for the consequences. We do not pretend here that we may inquire into what we believe to be the fact relative to the calling out of the militia of the state of Colorado upon the occasion mentioned in the complaint. It is immaterial whether that call was the result of a conference with a band of conspirators, known as mine owners, in the state of Colorado, or whether it flowed from the pure patriotism of the governor. It is immaterial whether the Mine Owners' Association guaranteed the pay of the militia during the time that they were in the field, and actually advanced the money to pay for their services, or whether the treasury of the state paid in cash or issued warrants therefor. It is immaterial whether the

militia went to the county of San Miguel practically as the hired men of the Mine Owners' Association, or the Citizens' Alliance of Telluride, or whether they went solely as the employes of the state. No one has pretended at any time or in any place that those matters could be inquired into for the purpose of determining the political question of the existence of a state of insurrection or rebellion, or any matter connected with it, but those matters are material under an averment of the governor's malice and ill-will toward this plaintiff in error, and they are material upon the question of damages under section 1979 of the Revised Statutes of the United States, and if the law has been violated, as we claim it has, while it does not change the political aspect of the situation, nor the political consequences which flow from the acts of the governor, it very materially changes the amount which the plaintiff in error is entitled to recover as the result of his unlawful arrest and detention.

None of the cases cited by counsel on the other side are parallel with the case at bar in any respect. Indeed, it is admitted by them, as we have heretofore said, and declared by the Supreme Court of Colorado, that no precedent exists for this case; that it is unlike any other case which ever came before the courts for their consideration, and it stands here now as one of the cases testing the Constitution of the United States to determine whether or not the guaranties contained in the fourteenth amendment are paramount in this land, or whether the various governors of the various states are paramount to the Constitution. It seems to us that there can be but one answer to such a question.

The only case which counsel cite as being instructive and as resting, in effect, upon all fours with the one at bar, is that of Druecker vs. Salomon, 21 Wis., 628. It is said that the propositions in the case at bar were upheld in that decision. In the first place the case was decided before the states had voted the fourteenth amendment. In the second place, there was no question of a federal guaranty involved. In the third place, the governor answered, and in his answer he justified by showing that he arrested the plaintiff in order to suppress a

riot, and in the enforcement of a draft which he was required to enforce under the war power given to the federal government. In the fourth place, testimony was taken upon complaint and answer. If these things are permitted, it is all we contend for in this proceeding. Let the governor justify if he can. Let him answer the allegations of this complaint as the governor of the state of Wisconsin did. Let him furnish his testimony so that the court can say that the steps which he took were in the exercise of his power as governor of the state, and that they were fairly and properly exercised, and that the imprisonment did not interfere with the guaranties contained in the fourteenth amendment. A fifth reason appears in the language of the decision, as follows (page 637):

"A military officer who should be directed by the president in time of war to arrest a particular individual as a spy, would act, in making the arrest, merely as a ministerial officer; and if, by mistake, he arrested the wrong man, he would be liable to an action. But if his orders were general, to go with military forces into an insurrectionary district and quell the insurrection, he would be clothed with authority discretionary, and in its nature judicial.

"*But it is unnecessary to pursue this line of reasoning further, or to inquire in what cases officers entrusted with authority discretionary,* AND WHICH THEY ARE AUTHORIZED TO USE ONLY IN CASE OF NECESSITY AND ON THE OCCURRENCE OF CERTAIN EVENTS, MUST, IN AN ACTION AGAINST THEM, ALLEGE AND PROVE IN JUSTIFICATION THE FACTS WHICH SHOW THAT THE EXIGENCY HAS ARISEN. We are of opinion that *the undisputed facts in evidence* in this case shows that the exigency had arisen at the time the troops were sent to Port Washington, when the defendant had the legal right to use the troops as he in his discretion should deem best to enforce the draft, and that he is not liable for the arrest of the plaintiff. We do not see how we can come to any other conclusion. It is clear that the defendant did not transcend the discretionary authority conferred upon him. His acts must therefore be regarded, in a certain sense, as the acts of the president. The same principles apply to his defense as would to that of a military commander if sued *for acts by him done in fighting a battle* to put down an insurrection or rebellion."

Is there any pretense here that the defendants were fighting a battle at the time they arrested Moyer? Is there any pretense that that battle continued for seventy-eight days, so as to engross all their time and attention? Is there any pretense here that after the battle, which is not pleaded and never existed, was over that they were engaged in hunting up the fugitive judges and other officers of the law in order to restore them to power so that they might lodge a complaint against Mr. Moyer? Nothing of that kind appears. On the contrary, it is clearly demonstrated that, without giving any reason therefor, and without the existence of any reason, they were only able to say that they were detaining Moyer because he had committed great crimes, which they proposed to lay before the civil authorities as soon as they were able to suppress the insurrection and rebellion.

We now tender an issue upon their right to detain Mr. Moyer for any such period, and if they can justify by showing the matters suggested, or enough of them to satisfy a jury, they will escape; otherwise they will and ought to be mulcted in damages.

It remains now to take up and consider the opinion of the Supreme Court of Colorado, 35 Colo., 159.

It is held by that opinion that section 2 of article IV of the Constitution, section 5 of the same article, and the Laws of 1897, page 204, section 2, constitute the authority for detaining Moyer, and that by reason of these provisions, notwithstanding the fact that he has been detained for what now appears to be seventy-eight days, he has had due process of law, for the court says, in the majority opinion, that the only question which they will attempt to decide is whether, under the facts stated and the laws of this state, the petitioner is entitled to his discharge.

The said sections are as follows:

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."

"The governor shall be the commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to

call out the militia, to execute the laws, suppress insurrection or repel invasion."

Section 2 of the Laws of 1897, at page 204, is as follows:

"When an invasion of, or insurrection in, the state is made or threatened, the governor shall order the national guard to repel or suppress the same; provided, that, when the emergency is great, and time will not admit of communication with the governor, the commanding officer of any portion of the national guard stationed at the scene of trouble may assemble his command, and after taking steps to notify the governor in the most speedy manner possible, aid the civil officers in repelling invasion or suppressing insurrection."

All of the consequences to Mr. Moyer flowed from these three provisions, two of the Constitution and one of the statute. *It was not claimed that any proclamation had been made directly suspending the writ of habeas corpus or the privilege thereof; indeed, it was averred that there had been no attempt to exercise any such authority directly.*

It was first held by the opinion that no issue was presented by the petition, but the case must be heard upon the writ and the answer thereto. It was then decided that the recitals in the proclamation to the effect that an insurrection existed could not be controverted, citing two cases from this court, one from Idaho and one from North Carolina. Later on one of the same cases from this court was cited, another from Wisconsin and another from Illinois, to the effect that parties who were engaged in riotous conduct render themselves liable to arrest by those who are engaged in quelling it. Upon the strength of these cases, none of which are said to be in point by the Supreme Court itself, it was held that Moyer's arrest and imprisonment constituted a mere temporary detention, because, forsooth, the governor said that he expected eventually to turn him over to the civil authorities for trial and punishment. Considering the promise of the governor, upon which the decision was founded, we beg to call attention to the fact that, as appears by the complaint in this case, the governor's promise was ultimately violated, and it is fair to presume, and it is proper, in criticising the opinion of the Supreme Court of Colorado, to observe, that

the majority opinion might have been different had they known what the governor was going to do, as it appears that he did do by the complaint in this case. But proceeding with the discussion, the force and effect of the decision is that the governor of the state of Colorado may, at his unbridled will, predicated upon a mere declaration by himself, as to which no one can inquire into, arrest and imprison any citizen of the United States for any length of time that he pleases. That is the law as it has been announced by the Supreme Courtof the state of Colorado. It bases its decision upon two cases from this court, neither of which are any authority whatsoever for the position, upon one case in Idaho, which is authority for the position, and upon a case in North Carolina which is pretty nearly on all fours against the conclusion to which the Supreme Court of Colorado arrived.

It is highly probable that we ought to content ourselves with ... at is said in the dissenting opinion of Mr. Justice Steele, who constituted exactly one-third of the whole number of the court. Certain it is that we would not be permitted to use language expressing the same views of the opinion, which was used by Mr. Justice Steele, without incurring possibly the censure of this court, but, in any event, the censure, if not something worse, of the Supreme Court of the state of Colorado.

But our full duty to our client, as we conceive it, requires us to call attention to some of the authorities, which are entirely ignored by the Supreme Court of the state of Colorado, upon the powers of the governor, which are, in effect, held by the opinion to be so great as that his mere *ipse dixit* with respect to the existence of an insurrection at once does away not only with the constitutional guaranties which we have so often urged, but *ipso facto* results in a suspension not only of the privilege of the writ of habeas corpus, but the writ itself.

We beg to be permitted therefore to discuss these claimed powers of the governor, to show, although it is not perhaps essential here, that they have no legal foundation.

Does the declaration of insurrection and rebellion establish the legal equivalent of the suspension of the writ of habeas corpus and the privileges thereof?

It will be seen that, while there may be some question of fact presented as to whether the conditions existed, which were declared in the proclamation of the governor, the real, substantial and only controversy is as to whether the law of "military necessity" following the proclamation and executive order of the governor has the effect to suspend the privilege of the writ of habeas corpus, and before we proceed to a discussion of the proper authorities governing in cases of like character, we desire to premise such discussion by some general observations. For the purposes of this argument it is not necessary for us to determine whether, in the control of the military authority, the governor is vested with the power to declare martial law in all or any portion of the territory embraced by the state, or otherwise. We may concede that he has that power, but it does not follow that from the possession of such power, if he has it, there exists, as an incident thereto, the right either to suspend the privilege of the writ of habeas corpus or to set aside the functions of the courts within what may be termed the military territory. It is to be observed in this case, however, that the proclamation does not purport to suspend the privilege of the writ, either generally or in any special instance whatever. It is to be further observed, by considering the terms of the proclamation and the executive order in connection therewith, that there is no claim that the courts are not in session, and that the civil authorities are not engaged in an attempt to exercise the various functions confided to them by the law. Indeed, the proclamation recognizes that the military is in a measure at least to act subservient to the civil authority, for the commander is directed to assist the sheriff of that county in the exercise of his functions, by acting either conjointly with him or independently of him, as he may see fit, to the end that the Constitution and the laws of the state of Colorado may receive that obedience which is their due. There is no statement that the courts have been forced to cease doing business or that the authority of the courts has been defied, or that the machinery of the law is not in full operation. The only claim in that respect is that if the military be not sent there, a riot is expected shortly to take place, and

the law is expected shortly to be broken by certain persons in the proclamation and order described. The return to the writ in the Colorado court, therefore, was in effect an admission of the matters stated, in the petition, which matters are embraced within the category of judicial cognizance, even though they were not before the court by the petition, viz.: That the courts are duly and regularly sitting in said county, engaged in the task of administering justice; that all offenders against whom complaint is made are being tried before such courts, and disposition is being made of their cases in accordance with the law. There is no power by the military to try for any offense a civilian whose cause is open to the courts of justice, and where the courts of justice are sitting to administer the law as against those who offend it. Indeed, there is no claim in the return that any such power exists. All that is claimed is that because the chief executive of the state has declared that a state of insurrection and rebellion exists in San Miguel county (although the balance of his proclamation and his executive order shows that no such thing does, as a matter of fact, exist); therefore, he has the power to say to the court that he may arrest and hold any person whom he sees fit, during the time of such military occupation, and when it suits the royal pleasure of the governor of the state to turn over an alleged offender to the courts of the state for trial, he will do so—and not before. The gist of the whole controversy, therefore, is, has he the power to so say to the court, and thereby suspend the privilege of this writ and the admitted jurisdiction which the court otherwise has? We will spend no time upon the discussion of the proposition of whether he has taken the proper or the improper means to exercise that power. We deny that he has the power at all, and, if he has not, it makes no difference what the conditions are nor what his recitation with regard to them may be, nor what an analysis of them will show, nor what evidence will sustain or overthrow his declaration. We desire to say, further, that in discussing this question of power, or lack of power, we have no "mass of decisions or obiter to analyze, dissect, differentiate, classify and obliterate." We have no "preconceived no-

tions of bench and of bar" to assail or overcome. All that can be said upon the subject has been ably said by those who have preceded us in cases of similar character. All that it would seem could be said to the contrary has been said by equally able men upon the other side. But whether the latter position be true or not, can better be ascertained at the close of this case.

This is no new question. Long prior to the time of King John, the writ was in existence, for Hallman, in his "History of the Middle Ages," says :

"Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became, from that era (magna charta), the right of every subject to demand it."

From the first volume of that work, at page 16, we quote:

"From earliest records of English law no freeman could be detained in prison except upon a criminal charge or for conviction or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a writ of habeas corpus."

From June, of 1215, the history of the writ has made its applicability here practically certain by a unanimous line of decisions. Sir William Blackstone said:

"Of great importance to the public is the preservation of this right of personal liberty, for if once it were left in the power of any of the highest magistrates to imprison arbitrarily whomsoever he or his officers thought proper, there would soon be an end to all other rights and immunities. Some have thought that unjust attacks even upon life or property at the arbitrary will of the magistrate are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the kingdom; but the confinement of a person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking *and therefore a more dangerous engine of arbitrary government.* And yet sometimes, when the state is in real danger, even this may be a necessary measure, but the happiness of our Constitution *is that it is not left to the executive*

power to determine when the danger of the state is so great as to render this measure expedient, for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing."

From the earliest history of the writ down to the present time there has been a more or less constant attempt, at intervals more or less frequent, to usurp the power of suspending this writ by the executive power, whether reposed in king or in president or in governor, and there has been as constant an assertion by a uniform line of decisions and of text writers that the power did not exist, with two exceptions only—one by an appellate court of no standing among the tribunals of this Union, and one by a United States district judge, whose judicial importance would not have been heard of had it not been for the one particular decision of his to which we refer. Both of these decisions will receive consideration later on in the course of this brief. During that period of English history from June, 1215, when the great habeas corpus clause was drafted into the Magna Charta, down to the thirty-first year of the reign of King Charles the Second, a period of more than four hundred and fifty years, there was no sovereign who, and no court which, had the hardihood to deny the privilege of this writ. But, in the course of time, subservient tools of the regal power having been appointed to the bench, found a way to delay the privilege of the writ from time to time and from term to term, so that much of its efficacy was lost, while its power remained undoubted. To remedy this evil, a statute was enacted in that year which provided heavy penalties and fines either for the delay in the issuance of the writ or a prompt hearing upon the return after it had been issued, and so sometimes the statute referred to has been denominated the second great charter of the liberties of the English-speaking people.

So it is seen that the power for which we contend is the exercise of nothing new. It is practically as old as the writ itself, and whenever its exercise has been attempted to be usurped by the sovereign in England, either directly or indirectly, the people have found a method by which to remedy it.

It can scarcely be believed that those who are engaged in armed opposition to the tyranny of a king, or their descendants, have turned completely about and given to a temporary servant elected by themselves an authority which was denied in the case of those who had theretofore been their rightful sovereigns. Probably no man ever lived who was a stronger advocate of centralized power than Alexander Hamilton—so much so, that there were at times open charges circulating against him of treasonable utterances with respect to his views upon the Constitution. He was the stoutest exponent of a strong central government, and in all his writings he espoused that side of the question. In the Federalist there are three chapters written by him on the exercise of the executive power confided to the president by the Constitution of the United States. Nowhere in any one of these chapters is there any claim that the president has the power which is claimed here for the governor of this state, and which was, after Hamilton's time, claimed for the president of the United States. It is a remarkable circumstance as tending to show that, under the conditions under which our original Constitution was made, it was never conceived that the executive authority, elected for the purpose of seeing to it that the laws are faithfully executed, should have the power to suspend (which is nothing more than the temporary repeal) any one of those laws. When General Hancock, in command of the military District of Columbia, was ordered by Judge Wiley, under a writ of habeas corpus, to produce the body of Mary E. Surratt, he was directed by the president to make an answer which is practically the same as the answer authorized by the governor in this state, in the following language:

"Executive Office, July 7, 1865.
"10 A. M.

"To Major General W. S. Hancock, Commanding, etc.

"I, Andrew Johnson, President of the United States, do hereby declare that the writ of habeas corpus has been heretofore suspended in such cases as this, and I do hereby especially suspend this writ and direct that you proceed to execute the order heretofore given upon the judgment of the military commission, and you will give this order in return to this writ.

"(Signed) ANDREW JOHNSON,
"President."

In an article found in the Cyclopedia of Political Science, Political Economy and United States History, volume 2, page 431, it is said:

"It does not appear that the writ was ever before, and certainly not since, suspended in any case of similar purport, and consequently stands alone in the executive and judicial history of the country as an example to be lamented and execrated by all men who love liberty."

The return to this writ justifies the same comment which was made in the case of Andrew Johnson. The power there sought to be enforced had been denied again and again by the highest court in all the land and in all the world. Article after article has been written upon executive power, one of the ablest of which is that found in the Constitutional History of the United States, by George Ticknor Curtis, volume 2, page 670. Speaking upon the general proposition of executive power, Mr. Curtis said:

"If the entire social condition of nine millions of people has, in the providence of God, been allowed to depend upon the executive decree of one man, it will be the most stupendous fact which the history of the race has exhibited."

If the liberties of the state of Colorado are to be dependent upon the right of one man to suspend the writ of *habeas corpus,* at the instance of another whose insanity no longer admits of reasonable doubt, then we may well say that it is one of the most stupendous facts that has ever occurred in the history of the race. We are unable to perceive why, if Charles H. Moyer can be restrained by the governor of this state under the advice of his adjutant general, such advice may not be extended so as to cover the justices of the Supreme Court of Colorado, if they should ever go counter to the will of either of those officials, and if it may be extended in that way, then indeed are we the subjects of a military oligarchy, and our boasted claims of freedom are a myth, a delusion and a snare. The fathers never contemplated, in the enactment of this Constitution, that the liberty of any man should depend upon the will of any other *man.* There is no distinction between the loftiest and humblest

in the eye of the law when rightly administered. Whatever affects the liberty of the meanest citizen of this land may extend to and does involve the liberty of the greatest. If the power here sought to be exercised exists, those who now invoke and support it will one day rue that it has ever been brought into existence. The decision of this court is not for a time; it is not for a condition, either assumed or real: It is for all time; it is for all conditions; it covers every circumstance and fits every situation to which our future history may bring us, and it is of the highest importance that with this matter squarely before the court it shall be decided—and decided aright. The military power of the governor is found in the following provisions of the Constitution:

"Article 4, section 2. The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.

"Section 5 of article 4. The governor shall be the commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia; *to execute the laws, suppress insurrection or repel invasion.*"

Speaking upon this subject of military power, Mr. Curtis, in the article referred to, says:

"He is the general-in-chief, and, as such, in prosecuting war, may do what generals in the field are allowed to do within the sphere of their actual operations, *in subordination to the laws of their country, from which alone they derive their authority.*"

Both the military and the governor are creatures and servants of the law. The military is neither the creature nor the servant of the governor. The governor has no power to make a law; no power to repeal a law; no power to suspend a law. He shall take care that the laws be faithfully executed, and we have shown that the only time on earth when the commander-in chief of any force can hold a man without a warrant or process of law is at a time *when the courts have gone out of business; when civil power has been by force put out of the field.* That was not the case in San Miguel county. No one

claims that it was. And if the courts were there in session, even though the military had the power to arrest, which they did not, they had no power of detention. Whoever is arrested by them, rightfully or wrongfully, must be speedily turned over to the civil authority, if the civil authority is engaged in the transaction of business. That they are is not denied in this proceeding.

Again, our Constitution provides, section 2, article 22, "That the military shall always be in strict subordination to the civil power." True, the governor is the commander-in-chief of the military, but, in order to make up the military, it is composed of both the governor and his subordinates, and the Constitution declares that the power, consisting of the governor and his subordinates, shall always be in strict subordination to the civil power. It is contended here that the Constitution and the laws of this state yield, by virtue of the *vis major*, in times where a condition exists such as is declared in San Miguel county. We find nothing in the Constitution which authorizes its repeal, or the repeal of any part of it, or the suspension of any part of it, by the executive. In times of war, as well as peace, the Constitution is the fundamental law, emanating from the sovereign power, to wit, the people—not for an hour—not for a day, and not for a condition of peace, but for all times, all places and all conditions. It makes no creature greater than the creator. It holds all creatures in subservience to it, and it is as much the Constitution of the county of San Miguel in the state of Colorado, as it is the Constitution of any other county in Colorado. This idea that military power and civil power are antagonistic to each other is the height of absurdity. Sometimes, when the law of force has driven out the civil power, then the military power exists alone until—and only until—the civil power can be restored. The moment that the civil power is restored it is supreme, and the governor and his subordinates are both in subordination to it, and that, too, whether the country is at that time in a state of war os in a state of peace. We lay it down as a proposition amply sustained by the authorities that the true test of whether military power exists in contradistinction to

the civil power is found in the fact of whether the courts are in the exercise of their functions. Wherever a court is ready to do business under the law which creates it, and where it has jurisdiction of the subject-matter, that court, both in times of war and in times of peace, is the superior of the military, and the military must act in strict subordination to it.

Ex Parte Milligan, 4 Wall., 2.
Johnson vs. Jones, 44 Ill., 142.

Mr. Curtis says:

"Can a general-in-chief disobey any law of his own country? When he can, he super-adds to his rights as commander, the powers of a usurper, and that is military despotism. In the noise of arms have we become deaf to the warning voices of our fathers to take care that the military shall always be subservient to the civil power? Instead of listening to these voices, some persons now seem to think that it is enough to silence objection to say, True enough, there is no civil right to do this or that, but it is a military act. They seem to have forgotten that every military act is to be tested by he Constitution and laws of the country, under whose authority it is done, and that, under the Constitution and laws of the United States, no more than under the government of Great Britain, or any free or any settled government, the mere authority to command an army is not an authority to disobey the laws of the country."

Proceeding with this article, Mr. Curtis says, in his discussion of the limits of military law:

"Military law is that system of laws enacted by the legislative power, for the government of the army and navy of the United States. * * * It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army, save by force of express provisions of the laws of congress, making such persons amenable thereto. The persons and the property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain. * * * Amidst the great dangers which encompass us, in our struggles to encounter them, in our natural eagerness to lay hold of efficient means to accomplish our vast labors, let us beware how we borrow weapons from the armory of arbitrary power. They can not be wielded by the hands of a

free people. Their blows will finally fall upon themselves. * * * The people yet can and will take care, by legitimate means, without disturbing any principle of the Constitution or violating any law, or relaxing any of their utmost efforts for their country's salvation, that their will, embodied in the Constitution, shall be obeyed. If it needs amendment, they will amend it themselves. They will suffer nothing to be added to it, or taken from it, by any other power than their own. If they should, neither the government itself, nor any right under it, will any longer be theirs."

Speaking of the writ of habeas corpus, Alexander Johnston, in the Cyclopedia referred to, says:

"But a suspension of the privilege of the writ of habeas corpus by congress only allows the executive to detain in custody without interference by civil courts, or to try by military law, prisoners who are taken in battle or are residents of hostile territory or are in the military or naval service *or are within the actual circle of armed conflict* WHERE COURTS ARE IMPOTENT, and no power in the United States can lawfully take away the privilege of the writ from private citizens in territory not rebellious or invaded, *and where the courts are in regular operation.*" Appleton's American Cyclopædia, Article Habeas Corpus.

That is our contention here. Even though the governor had the power to suspend the writ, which he has not, a necessary incident to the exercise of that power would be the basic fact of the impotency of the courts. It is a curious fact in history that the privilege of this writ was never attempted to be suspended, so far as the federal government was concerned, prior to 1861. Certain federal officers, at the time of the conspiracy of Aaron Burr, and in General Jackson's case at New Orleans, had refused to obey the writ, and a state government had suspended it at the time of the Dorr rebellion. But the question which is now before this court had never squarely arisen prior to President Lincoln's attempt to suspend the writ in the Merryman case, to which the court's attention will be further called. One of the most interesting reports dealing with the history of the writ is found in 3d Hills, at page 647, and for the history of many interesting cases arising under

the writ and the extent of the power of the courts and the executive over the writ, the arguments of David Dudley Field, James A. Garfield and J. S. Black may be read with interest, preceding the decision of the court in the famous Milligan case, found in 4th Wallace, at page 2. Mr. Black, among other things said:

"The counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read *Coke's Institute,* and the opinion of Mr. Justice Grier, in the Prize Cases, *and they know it to be a settled rule that war can not be said to exist where the civil courts are open.*"

The same thing is true here. There is no declaration that the courts are not open, and none that they can not and will not do their full duty. The respondents avow their intention of turning this man over to the courts for trial when they get ready. His constitutional guarantee, and yours and ours, is that we shall have a speedy trial, without delay, that the nature of the charge shall be made known to us, that we shall be confronted with the witnesses, and that we shall be tried by a jury of our peers, instead of being compelled to rot in a prison, at the will either of the governor of his military satellites.

Mr. Black further says:

"That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone, with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a future war what results will follow from your decision indorsing the attorney-general's views? They are very obvious. At the instant when the war begins, our whole system

of legal government will tumble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

"This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The president or the congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. *A simple declaration of hostilities is more terrible to us than an army with banners.*

"To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: *that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back.*

"The convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind of public employment, state or national, civil or military, should swear, without reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity, to impose upon them an oath like that, if they intended and expected it to be broken half the time.

"These statesmen who settled our institutions, had no such notion in their minds. Washington deserved the lofty praise bestowed upon him by the president of congress when he resigned his commission—that he had always regarded the rights of the civil authority through all changes and through all dis-

asters. When his duty as president afterwards required him to arm the public force to suppress a rebellion in western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia.

"Opposite counsel must be conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. They do so; and argue that, while the Constitution, and the acts of Congress, and Magna Charta, and the common law, and all the rules of national justice, remain under foot, they will try American citizens according to what they call the *laws of war.*"

So here, if, with or without cause or reason, the governor of this state may declare that a state of insurrection and rebellion exists in San Miguel county, and thereby suspends the privilege of the writ of habeas corpus, he may declare it as to the rest of the state. His will is alone supreme in the matter, with respect to the declaration and its consequences, and if his position be correct, the moment that he makes the declaration, without any regard to who has the power to suspend the writ of habeas corpus, he may disobey the courts and so may the officers acting under him. If this is the law, then it is the law for no other states in this Union than Idaho and Colorado, as declared up to the present time.

Let us now proceed to an examination of the authorities decided by the courts of last resort, in language which admits of but one interpretation:

The first decision on the subject in the United States was rendered in 1807, and is the case of Ex Parte Bollman, 4 Cranch, 75. Chief Justice Marshall said:

"If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, *it is for the legislature to say so.*

"That question depends on political considerations, *on which the legislature is to decide.* Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

"The motion, therefore, must be granted."

It has been claimed by those who attempted to maintain to the contrary of this opinion of Judge Marshall, that his

opinion was mere obiter. This is not a just criticism. The power of the court to issue writs of habeas corpus was squarely before the court, and Judge Marshall attempted to lay down the law governing the subject.

The question next arose in the state of Louisiana, in 1815. General Jackson, under the authority of the president, attempted to declare martial law and suspend the writ of habeas corpus. This alleged power is thoroughly discussed by the Supreme Court of Louisiana in the case of

Johnson vs. Duncan, 3 Martin (O. S.), 530.

The court unanimously held that under the Constitution of the United States the executive had no such power.

The court says:

"This leads me to the examination of the power of suspending the writ of habeas corpus, and that which it is said to include, of proclaiming martial law, as noticed in the Constitution of the United States. As, in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it can not be said that any of the limitations which it contains extend to any of the other branches. *'Iniquum est perimi de pacto, id de quo cogitatum non est.'* If, therefore, this suspending power exist in the executive (under whose authority it has been endeavored to exercise it), it exists without any limitation, then the president possesses without limitation a power which the legislature can not exercise without a limitation. Thus, he possesses a greater power alone than the house of representatives, the senate, and himself jointly. Again, the power of repealing a law, and that of suspending it (which is a partial repeal), are legislative powers. For, *'eodem modo quo quid constituiter, eodem modo destruitur.'* As every legislative power that may be exercised under the Constitution of the United States is exclusively vested in congress, all others are retained by the people of the several states.

"In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended; but the executive did not thus of itself stretch its own authority. The precaution was deliberated upon and taken up by the representatives of the people. (Delome, 409.) And there the power is safely lodged, without the danger

of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have gratified when they shall thus have overthrown the columns of public liberty. (Id., 275.)

"If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer that in peace or war no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, 'martial law can not be used without the authority of parliament.' (5 Comyns., 229.) *The authority of the monarch himself is insufficient.* In the case of Grant vs. Sir C. Gould, 2 H. Bl., 69, which was on a prohibition (applied for in the Court of Common Pleas) to the defendant, as judge advocate of a court martial, to prevent the execution of a sentence of that military tribunal, the counsel who resisted the motion said it was not to be disputed that martial law can only be exercised in England so far as it is authorized by the mutiny act and articles of war, all of which are established by parliament, or its authority, and the court declaring it totally inaccurate to state any other martial law, as having any place whatever within the realm of England."

In the same case Mr. Justice Derbigny, in delivering his opinion, said:

"To have a correct idea of martial law in a free country, examples must not be sought in the arbitrary conduct of absolute governments. The monarch who unites in his hands all the powers may delegate to his generals an authority unbounded as his own. But in a republic, where the Constitution has fixed the extent and limits of every branch of government in time of war, as well as of peace, there can exist nothing vague, uncertain or arbitrary, in the exercise of any authority.

"The Constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that in times of public danger the executive power shall reign to the exclusion of all others. *It does not thrust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision, and had they done it, the states would have rejected a Constitution stained with a clause so threatening to their liberties.* In the meantime, conscious of

the necessity of removing all impediments to the exercise of the executive power, in cases of rebellion or invasion, they have permitted congress to suspend the privilege of the writ of habeas corpus in those circumstances, if the public safety should require it. Thus far, and no further, goes the Constitution. Congress has not hitherto thought it necessary to authorize that suspension. *Should the case ever happen, it is to be supposed it would be accompanied with such restrictions as would prevent any wanton use of power.* 'In England,' says the author of a justly celebrated work on the Constitution of that country, 'at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended; but the executive power did not thus of itself stretch its own authority. The precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals. The proceedings against them were to be carried on no otherwise than in a public place. They were to be tried by their peers, and have all the usual means of defense allowed them, such as calling of witnesses, peremptory challenges of jurors,' etc. And can it be asserted that, while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power? *The idea is not only repugnant to the principles of a free government, but subversive to the very foundations of our own.*"

General Jackson's attempt to override the laws of the land also came before the District Court of the United States for the Louisiana district in the case of the United States vs. Jackson. The court fined General Jackson $1,000 for having acted in opposition to a court order, and held that he had no authority to resist the court.

See note to Johnson vs. Duncan, 3 Martin, 557.

In 1845, in the case of Wright vs. Johnson, 5 Ark., 687, in construing the section of the Constitution of Arkansas

which provides that the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion, the Supreme Court said:

"And even then it would take an act of the legislature to authorize its suspension."

The question next arose in 1861, and was passed upon by the chief justice of the Supreme Court of the United States, in the case of

Ex Parte Merryman, Taney, 246.

On the 25th day of May, 1861, John Merryman was arrested at his home in Baltimore county, Maryland, by an armed force in the military service of the United States, and confined in Fort McHenry. On the next day a writ of habeas corpus was issued by Chief Justice Taney, returnable on the 27th day of May. A return was made to the writ that the prisoner was charged with treason and was hostile to the government, and that the writ of habeas corpus was suspended in such cases by the president of the United States for the public safety. The chief justice issued an attachment for the arrest of the commanding officer, who, while making return of the writ, had failed to produce the body of the prisoner, but the marshal was unable to serve the writ. The chief justice, upon the return of the marshal that he was unable to serve the writ of attachment, delivered the following oral opinion:

"I ordered this attachment yesterday because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds:

"1. That the president, under the Constitution of the United States, *can not suspend the privilege of the writ of habeas corpus*, nor authorize a military officer to do it.

"2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offense against the laws of the United States, except in aid of the judicial authority, and subject to its control; *and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.*

"It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.

"I forbore yesterday to state orally the provisions of the Constitution of the United States which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the Circuit Court, in the course of this week."

Later the learned judge filed an exhaustive written opinion, which is as follows:

"OPINION.

"TANEY, C. J. The application in this case for a writ of *habeas corpus* is made to me under the fourteenth section of the judiciary act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That act gives to the courts of the United States, as well as to each of the justices of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

"The petition presents the following case: The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at 2 o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

"The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

"A copy of the warrant, or order, under which the prisoner was arrested was demanded by his counsel, and refused; and it is not alleged in the return that any specific act, constituting any offense against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of habeas corpus, *upon the ground that he is duly authorized by the president to suspend it.*

"The case, then, is simply this: A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

"As the case comes before me, therefore, *I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer,* and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. *And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of congress.*

"When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon

the subject and determine whether the public safety required it. *And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.*

"Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, *and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them.* But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

"The clause of the Constitution which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the ninth section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing 'that all legislative powers therein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.' And, after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants; and legislative powers which it expressly prohibits; and at the conclusion of this specification, a clause is inserted giving congress 'the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'

"The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might

be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned; and, accordingly, this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend. The great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

"It is true that in the cases mentioned congress is, of necessity, the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.

"*It is the second article of the Constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizens now claimed was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.*

"The article begins by declaring that the executive power shall be vested in the president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. The short term for which he is elected, and the narrow limits to which he is confined, shows the jealousy and apprehension of future danger which the framers of the Constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

"He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeach-

ment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called into actual service; but no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the president used, or designed to use, it for improper purposes. And although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states.

"So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He can not appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the senate, and can not appoint even inferior officers, unless he is authorized by an act of congress to do so. He is not empowered to arrest any one charged with an offense against the United States and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person 'shall be deprived of life, liberty or property, without due process of law'—that is, judicial process.

"Even if the privilege of the writ of *habeas corpus* were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the Constitution immediately following the one above referred to (that is, the sixth article) provides that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.'

"The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires *'that he shall take care that*

the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

"With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus, or arrest a citizen, except in aid of the judicial power. *He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.*

"Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the Constitution, in express terms, provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.'

"Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English Constitution, which had been firmly established before the Declaration of Independence. Blackstone states it in the following words: 'To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison.' 1 Bl. Com., 137.

"The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their

personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizens against executive encroachments and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

"The right of the subject to the benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must, therefore, have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the King's Bench; if no specific offense were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offense were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Charles II, commonly known as the great habeas corpus act.

"This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was given no effectual remedy against its violation. Until the statute of 13 William III, the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partisan judges often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

"The great and inestimable value of the habeas corpus act of the 31 Charles II, is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

"A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practiced through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

"Blackstone says: 'To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore and in what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail or remand the prisoner. And yet, early in the reign of Charles I, the court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they would not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the Petition of Right (3 Charles I), which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Seldon and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and the government," the judges delayed for two terms (including, also, the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that "if they were again remanded for that cause perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present, according to Mr. Seldon's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.' 3 Bl. Com., 133, 134.

"It is worthy of remark that the offenses charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Seldon. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty, upon the habeas corpus issued in his behalf, excited the universal indignation of the bar.

"The extract from Hallam's Constitutional History is equally impressive and equally in point: 'It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II enlarged in a great degree our liberties, and forms a sort of epoch in their history. But, though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if, indeed, is not more ancient), that the statute of Charles II was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege.' (4 Hallam's Const. Hist., 14.)

"While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its enjoyment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone (1 Bl. Com., 136): 'But the happiness of our Con-

stitution is that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving the reason for so doing.' If the president of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the crown; a power which the queen of England can not exercise at this day, and which could not have been lawfully exercised by the sovereign, even in the reign of Charles the First.

"But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. *To guide me to a right conclusion, I have the Commentaries of the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States; and also the clear and authoritative decision of that court itself given more than half a century since, and conclusively establishing the principles I have above stated.*

"Mr. Justice Story, speaking in his Commentaries of the habeas corpus clause in the Constitution, says: 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the Constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge

whether the exigency had arisen *must exclusively belong to that body.* 3 Story's Com. on the Constitution, section 1836.

"And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of Ex Parte Bollman and Swartout, uses this decisive language, in 4 Cranch, 95: 'It may be worthy of remark that this act (speaking of one under which I am proceeding) was passed by the first congress of the United States, sitting under a Constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.' And, again, on page 101: 'If, at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws.' I can add nothing to these clear and emphatic words of my great predecessor.

"But the documents before me show that the military authorities in this case have gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer or any other person, had reason to believe that the prisoner had committed any offense against the laws of the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney;

it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and, therefore, no reason whatever for the interposition of the military.

"Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

"The Constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

"These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

"In such a case, my duty is too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

Of course it is not necessary for us to say that every provision of the Constitution of the United States pointed out in the foregoing opinion, as showing that the executive could not suspend the writ of habeas corpus, is also to be found in the Constitution of Colorado.

The next case that arose as to the suspension of the writ was in October, 1861, and is reported in

U. S. ex rel. Murphy vs. Porter, 2 Hayw. & H., 394 (Fed. Case, 16074a).

Judge Merrick, one of the circuit judges for the District of Columbia, issued a writ of habeas corpus, addressed to General Porter, the provost marshal of the city of Washington, commanding the production of a soldier, whose father claimed he was under the age of 18 years. The president had attempted to suspend the writ of habeas corpus, and the writ was ignored. The court held this unlawful, saying:

"The president, charged by the Constitution to take care that the laws be executed, has seen fit to arrest the process of this court, and to forbid the deputy marshal to execute it. It does not involve merely the question of the power of the executive in civil war to suspend the great writ of freedom, the habeas corpus. When this rule was ordered to give efficiency to that writ, no notice had been given by the president to the courts of the country of such suspension here, now first announced to us, and it will hardly be maintained that the suspen-

sion could be retrospective. The rule on this case, therefore, whatever may be the president's power over the writ of habeas corpus, was lawfully ordered, as well as the writ on which it was founded. The facts on which the rule was ordered by the court are assumed to be true as respects the president, because the president had them before him, and has not denied them, but forbade the deputy marshal to serve the rule on General Andrew Porter. The president, we think, assumes the responsibility of the acts of General Porter, set forth in this rule, and sanctions them by his orders to Deputy Marshal Philips not to serve the process on the provost marshal. The issue ought to be and is with the president, and we have no physical power to enforce the lawful process of this court on his military subordinates against the president's prohibition.

"We have exhausted every practical remedy to uphold the lawful authority of this court. It is ordered this 30th day of October, 1861, that this opinion of the court be filed by the clerk and made a part of the record, as explaining the grounds on which we now decline to order any further process in this case.

"Merrill, circuit judge, submitted the following: As a member of this court, I wish it understood that notwithstanding the blow leveled at this court, I do distinctly assert the following principles: (1) That the law in this country knows no superior. (2) That the supremacy of the civil authority over the military can not be denied; that it has been established by the ablest jurists, and, I believe, recognized and respected by the great father of the country during the Revolutionary war. (3) That this court ought to be respected by every one as the guardian of the personal liberty of the citizen, in giving ready and effectual aid by that most valuable means, the writ of habeas corpus. (4) I therefore respectfully protest against the right claimed to interrupt the proceedings in this case."

In September, 1862, the question came before the United States District Court in the state of New York, and will be found reported in

Ex Parte Benedict, Fed. Case No. 1292.

Again, the court held that the executive had no power to interfere with the writ of habeas corpus, saying:

"Even in the midst of our present struggle, we should not forget the teachings and history of the past, and regard as trivial and unimportant constitutional principles, the persist-

ent violation of which has led to the dethronement of kings, and the overthrow of long-established forms of government. We should not forget the letters *du cachet* of the French monarchs, or the illegal imprisonments under Charles I. In our efforts to read aright and profit by the terrible lesson which the present condition of our unhappy country presents, we should not forget what Hume, and Hallam, and Blackstone, and Marshall, and Story, and Kent, have taught us. The language of Blackstone (1 Bl. Comm., 134-136) has been often quoted and approved, and it states with accuracy the laws and Constitution of England, and the practice of the French monarchy at the time he wrote. This, with the proceedings of the house of commons upon the celebrated Petition of Rights, shows the importance which the sore experience of the people of England had given the questions involved in the present case. Blackstone says (volume 1, page 134):

"'Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observation as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it can not ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here, again, the language of the great charter is that no freeman shall be taken or imprisoned but by the lawful judgment of his equals or by the law of the land. And many subsequent old statutes expressly direct that no man shall be taken and imprisoned by suggestion or petition to the king or his counsel, unless it be by legal indictment, or the process of the common law. By the Petition of Right (3 Car. I) it is enacted that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I, chapter 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of habeas corpus, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment shall be just, and thereupon do as to justice shall appertain. And by 31 Car. II, chapter 2, commonly called the "Habeas Corpus Act," the methods of obtaining this writ were so plainly pointed out and enforced that, so long

as this statute remains unimpeached, no subject of England can be long detained in prison, except in cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M., part 2, chapter 2, that excessive bail ought not to be required.

" 'Of great importance to the public is the preservation of this personal liberty; for, if once it were left in the power of any of the highest magistrates to imprison whomever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom; *but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and, therefore, a more dangerous engine of arbitrary government.* And yet, sometimes, when the state is in danger, even this may be a necessary measure. But the happiness of our Constitution is that *it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing, as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger.*'

"Again Blackstone says, volume 3, pages 133-135:

" 'In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural, inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case, without the special permission of law—a doctrine coeval with the first rudiments of the English Constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman Conquest, asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times and the occasional despot-

isms of jealous and usurping princes, yet established on the firmest basis by the provisions of the Magna Charta, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner; and yet, early in the reign of Charles I, the Court of King's Bench, relying upon some arbitrary precedents (and those, perhaps, misunderstood), determined that they could not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the Petition of Right (3 Car. I), which recites this illegal judgment, and enacts that no freeman hereafter shall be imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including, also, the long vacation), to deliver an opinion how far such charge was bailable. And when at length they agreed it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that, "if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of their imprisonment." *But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.*

"'These pitiful evasions gave rise to the statute (16 Car. I, chapter 10, paragraph 8) whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or any of the members thereof, he shall have granted to him without delay, upon any pretense whatsoever, a writ of habeas corpus, upon demand or motion made to the

Court of King's Bench or Common Pleas, who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain in delivering, bailing or remanding such prisoner. Yet, still, in the case of Jenks, before alluded to, who, in 1676, was committed by the king in council, for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, and the chief justice (as well as the chancellor) declined to award a writ of *habeas corpus ad subjiciendum*, in vacation, thought at least he thought proper to award the usual writs *ad deliberandum*, etc., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had, in some measure, defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an alia and pluries, were issued, before he produced the party, and many other vexatious shifts were practiced to detain state prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power, by the crown or its ministers, has always been productive of struggles, which either discovers the exercise of that power to be contrary to law, or, if legal, restrains it for the future. This was the case in the present instance; the oppression of an obscure individual gave birth to the famous habeas corpus act (31 Car. II, chapter 2), which is frequently considered as another Magna Charta of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on those writs (though not within the reach of that statute, but issuing merely at the common law), to the standard of law and liberty.'

"The complaint contained in the 3d, 4th and 5th articles of the Petition of Right, referred to by Mr. Justice Blackstone, and to which the reluctant consent of Charles I was enforced by the British house of commons (Hume's History of England, chapter 51, and copy of petition in note; and, see Hall, Const. Hist., chapter 7), relating to illegal arrests and imprisonments, and the denial of relief upon habeas corpus. These articles are as follows:

" 'III. And whereas, also, by the statute called the great charter of the liberties of England, it is declared and enacted that no freeman may be taken or imprisoned, or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

"'IV. And in the eighth and twelfth year of the reign of King Edward III it was declared and enacted, by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law.

"'V. Nevertheless, against the tenor of the said statutes and other, the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before justice, by your majesty's writ of habeas corpus, there to undergo and receive as the courts should order, and their keepers demanded to certify the cause of their detainer, no cause was certified, but that they were detained by your majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to law.'

"And by the tenth article of this Petition of Rights it was prayed, among other things, 'that no freeman, in any such manner as is before mentioned, be imprisoned or detained,' and to this Charles I, after much delay, and a prior evasive answer, was at last compelled by the house of commons to yield his assent in the customary form, 'Let it be law as is desired,' and thereby, as Hume says, 'give full sanction and authority to the petition.' It is true that he afterwards acted in violation of the rights thus solemnly recognized; but it is equally true that his head was brought to the block by his oppressed and indignant people.

"No further discussion can be necessary to show the importance of the principles involved in this case, or the duty of every judicial officer to construe, with all reasonable strictness, the doubtful language of an executive order capable of being made an instrument of innumerable and gross encroachments upon the liberty of the citizen. There may be some ground for doubt in regard to the true construction of the orders of the war department of August 8, 1862, but I am inclined to think they were not intended to have the operation and effect which it has, as I understand, been contended should be given to them, in accordance with what is alleged to be their true meaning and effect. However that may be, in the view I have felt compelled to take in regard to another question arising in the case, I do not deem it necessary to say more in respect to the proper construction of this order. *The question referred to is whether the privilege of the writ of habeas corpus has been, in any case, legally suspended.*

"In considering this question I shall not inquire whether the order under consideration was made, or purports to be made by or under the authority of the president of the United States. The use of the words, 'by direction of the president of the United States,' in the first subdivision of the order, and their omission in the second and third subdivisions, may cast some doubt upon the point, but for the purpose of the present question I shall assume that the first and second orders of the 8th of August, 1862, are in fact and in law the orders of the president of the United States.

"*Can the president, then, without the authority of congress, suspend the privilege of the writ of habeas corpus?* When the counsel for the petitioner, some days since, suggested that he desired to apply for a writ of habeas corpus, to bring up the body of the petitioner, I had the impression that congress, at its last session, had passed an act authorizing the president to suspend the writ of habeas corpus and that he had sanctioned the order of the war department under such authority. If this had been the case, I should have held it to be my duty to refuse a writ in a case within the scope of the law of congress and the order of the president; but having, since that suggestion was made, received the acts of the last session, I find that I was mistaken, and that congress has passed no law on this subject. The question of the power of the president to suspend the privilege of habeas corpus without the authority of congress, is therefore presented in this case, if the order of the war department is deemed to be the order of the president, and to extend to such a case as that now under considration. The question is one of constitutional law and constitutional construction, *and was, I think, generally considered as no longer open to controversy,* until it was brought prominently before the public by the case of Merryman, before the learned and venerable chief justice of the United States. In that case (Case No. 9487) the highest judicial officer in the United States did not hesitate to declare, in respect to the claim that the president had the power to suspend the privilege of the writ of habeas corpus, 'that he listened to it with some surprise, for I' (he) 'had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by the act of congress.' The clause upon which the question arises is found in the first article of the Constitution of the United States, which treats of congress and its powers, and is in these words: 'The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the

public safety may require it'; and the reasoning of the chief justice in the case referred to is sufficient, in my judgment, to show that the power of suspension is a legislative and not an executive power, and must be exercised, or its exercise authorized by congress. But the question does not rest upon the reasoning or authority of the present chief justice. He properly cited the authority of Chief Justice Story, and of the Supreme Court of the United States, when the chief justice's seat was filled by John Marshall, the ablest constitutional lawyer our country has produced. * * * The chief justice, in his opinion in the case of Merryman (Case No. 9487), referred to the action of congress at the time of Burr's conspiracy, in 1807, and to the fact that it was not then claimed that the president had power to suspend the privilege of the writ of habeas corpus. There appears to have been no report of the debate in the senate on the bill there introduced, in consequence of a special message from President Jefferson (as it was considered in secret session), but in the house the bill was ably and openly discussed by several members; and, though the bill only proposed to suspend the privilege 'for three months and no longer,' in 'all cases where any person or persons charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety or neutrality of the United States, have been or shall be arrested or imprisoned by virtue of any warrant or authority of the president of the United States, or from the chief executive magistrate of any state or territorial government or of any person acting under the direction or authority of the president of the United States,' the house, by a vote of 113 to 19, rejected the bill, on the usual motion, 'that the bill be rejected'; which is considered a motion of indignity, indicating that the bill is not worthy of deliberate discussion and consideration in the usual form. Hurd, Hab. Corp., 135."

The learned judge then quotes at length from the Louisiana decision, which we have already called attention to, and says:

"That the doctrines of these decisions, in regard to the exercise of the power of suspending the privilege of the habeas corpus, have been almost *universally considered as incontrovertible, is fully established by reference to the works of many elementary writers, and by the fact that no evidence of the dissent of other jurists or of the profession has been recorded.* Hurd, in his work on habeas corpus, in reference to the Constitutional provision before referred to, says: "Rebellion and in-

vasion are eminently matters of national concern; and charged, as congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to make effectual such measures as it may deem expedient to adopt for their suppression.' (Page 133.) And (page 134): 'This power has never been exercised by congress.' And, again (page 149): 'The provision of the Constitution relating to the writ of habeas corpus limits the legislative power.'

"Smith, in his Commentaries, also considered this provision of the Constitution under the head of 'Constitutional Restriction Upon Legislative Power.' Smith, Comm., chapter 8, paragraph 229. And Curtis, in his history of the Constitution, also refers to it as one of the restrictions upon the powers of congress. (2 Curt., Const., page 359.) In Sheppard's Constitutional Text Book, at page 142, this is given as a restriction upon the power of Congress. And in the conclusion of the article, 'Habeas Corpus,' in Appleton's New Encyclopedia, it is said: 'It has been solemnly decided that the habeas corpus act can be suspended only by the legislature, and that the proclamation of martial law, by a military officer, is not sufficient.' The article on martial law, in the same work, contains the following: 'The Constitution, by implicaton, also permits its proclamation, by that clause which provides that the privileges of the writ of habeas corpus shall not be suspended,' etc. 'The right to judge whether the exigency has arisen belongs, it seems, exclusively to congress. So, in England, martial law, and its incident, the suspension of the writ of habeas corpus, required the authority of parliamentary acts to give them a constitutional existence.'

"*When the question of the adoption of the federal Constitution was under consideration in the Massachusetts convention, the constitutional restriction upon the power of suspending the privilege of the habeas corpus was discussed by Judges Dana and Sumner, in the presence, doubtless, of Nathaniel Gorham and Rufus King, members of that convention, as well as of the one that framed the Constitution of the United States, and both judges evidently regarded it as certain that congress only could suspend the privilege.* 2 Elliot, Deb., 108, 109; Hurd, Hab. Corp., 126, 127. And during Shay's rebellion it was the legislature of Massachusetts, and not her governor, that suspended the privilege of this writ. Hurd., Hab. Corp., 136. Against these authorities, and the general sentiment of elementary writers, there stands opposed the practice of the war department, first inaugurated in a period of great excitement and alarm, and the official opinion of the learned and ven-

erable gentleman who now holds the office of attorney general of the United States. For that gentleman I entertain the highest respect. His purity of motive and character, his great legal acquirements, and his undoubted patriotism and ability, are unquestioned; but, even in these respects, that excellent gentleman would not wish his friend to claim more than that he was the equal of the learned chief justice of the United States. Placing their opinions upon the same footing, they would only neutralize each other, and then the deliberate opinions of Marshall and Story and Martin, and the other justices of the Supreme Court, who concurred in the opinion of their chief in the case of Ex Parte Bollman, 4 Cranch (8 U. S.), 75, supported, as they are, in my judgment, by unanswerable argument, are decisive of the question, and constrain me to decide that *the president, without the authority of Congress, has no constitutional power to suspend the privilege of the writ of habeas corpus in the United States.* The prisoner is, therefore, in any view which I have been able to take of this case, entitled to the benefit of the writ of habeas corpus, and to be discharged, unless some reason for detaining him, beyond that set out in his petition, is shown. But other reasons besides those set forth in his petition, or in any warrant or order of commitment under which he may be now held, may be shown. The district attorney of the United States will have notice of the allowance of the writ of habeas corpus, and if, on its return, or at any time, he, or the marshal of the United States, or his deputy, or any other citizen, can show that the petitioner has been guilty of any offense against the laws of the United States, or has in any way subjected himself to legal arrest and imprisonment, it will be my duty (a duty which I shall not hesitate to perform) to commit him to prison by a proper and sufficient order or warrant.

"I have thus hastily, though with some labor, written out an opinion in this matter, though the application for a habeas corpus was ex parte, and was decided without the benefit of an argument for or against the application. I have done so, because the duty of deciding upon the application was a delicate and responsible, as well as an imperative one; and being compelled to decide a question of such importance, under such circumstances, it was but respectful to those high officials, whose legal opinions, opposed to mine, have led to the arrest of the petitioner and the denial of the privilege of the writ of habeas corpus, that I should state, at some length, the reasons for my conclusions and the authority on which I relied. I have preferred, however, even in ex-

pressing my own decided opinions, to adopt the deliberate and eloquent language of departed jurists, of world-wide reputation—language used by them in deciding cases which had been fully argued, and used, too, after they had had the benefit of a full consultation with their learned associates on the bench—rather than the less forcible and less authoritative language in which I might have expressed my own opinions. The opinions referred to have been before the profession and the country for more than forty years, and, so far as I know, they had not, until a very recent period, been questioned, or their doctrines assailed by any respectable jurist. I can not but endeavor to follow, though with feeble and uncertain steps, in the paths of constitutional duty, clearly and distinctly marked with the ineffaceable footprints of Marshall, of Story, of Washington, of Livingston, of Martin, and of Taney; and, guided by the serene and steady light of their recorded opinions, I may certainly hope not to go far astray.

"I have endorsed the proper allowance upon the petition presented, and upon the writ prepared by the clerk."

The question next arose in Vermont, in October, 1862, and is reported in

Ex Parte Field, 5 Blatch., 63.

This case, which has been heretofore adverted to, was before Judge Smalley, a circuit judge of the United States for the district of Vermont. He held that the orders of the war department, dated August 8, 1862, which authorized the arrest of persons about to depart from the United States, and of persons seeking to escape from the military draft and suspending the writ of habeas corpus as to them, were invalid, and calls attention to the fact that on September 6, 1862, said orders were rescinded. The judge then considers the order of President Lincoln, made on September 24, 1863, in which he suspended, or attempted to suspend, the writ of habeas corpus as to all persons arrested by military authority, and holds that the president has such power. The judge says that Mr. Reverdy Johnson, Mr. Horace Binney and Judge Parker, "eminent lawyers and pure patriots," had given an opinion that the president had such power, and that fact is "certainly entitled to great weight," although he admits he has not seen

the opinions. It does not appear, from the opinion, whether the judge, who stands alone in all the array of judges who passed upon this quesction, relied most on the fact that the parties advising the president were pure patriots, or that they were good lawyers. Doubtless the judge himself was a patriot, and was trying to render a patriotic opinion. We submit that the judges who stuck to the Constitution as it was understood at the time it was adopted and as it was intended to mean, and as it did and does clearly mean, were better patriots than was a judge who undertook to construe it for "patriotic purposes."

The next question arose in December, 1862, in Wisconsin, in the case of

In re Kemp, 16 Wis., 382.

General Elliot, commanding the department of the Northwest, answered the writ of *habeas* corpus that the president had suspended the writ. The three justices of the Supreme Court each filed opinions. Each held that the president had no power to suspend the privilege of the writ. In speaking of the questions involved in such a return, Chief Justice Dixon says:

"They are, in my judgment, settled, so far as any matters of judicial inquiry can be settled, before a court not authorized finally to determine the law for itself, by the uniform decisions of the courts and the concurrent opinion of eminent jurists and statesmen. I say matters of judicial inquiry, because I observe a distinction has been attempted by the present learned attorney-general of the United States, between *judicial* questions and *political* questions. I question the soundness of this distinction, and, without particular criticism, feel myself obliged, for the present, and until it has received the sanction of the federal Supreme Court, to disregard it. I am acting in a judicial capacity and must be governed by the established rules and maxims of the courts.

"I may furthermore add that the principles involved have recently been the subjects of most profound and elaborate arguments by several most able lawyers and judges. I refer to the opinion of Chief Justice Taney, in *Ex Parte John Merryman*, 9 American Law Register, 524; the article entitled *'Habeas Corpus and Martial Law,' North American Review*, October, 1861,

pages 471 to 519, supposed to be from the distinguished pen of Professor Parker, of Cambridge; the argument of Judge Curtis, of Boston, entitled 'Executive Power,' pamphlet, Boston, Little, Brown & Co., 1862; and the opinion of Judge Hall, of the Northern District of New York, *In the matter of Judson D. Benedict.* I might, under any circumstances, without repeating the arguments, content myself with a reference to these as a complete vindication of the conclusions at which I have arrived, and which I will proceed to state in as few words as possible.

"And, first, I think the president has no power, in the sense of the ninth section of the first article of the Constitution of the United States, to suspend the privilege of the writ of *habeas corpus. It is, in my judgment, a legislative and not an executive act; and the power is vested in congress.* Upon this question it seems to me that the reasoning of Chief Justice Taney, in *Ex Parte Merryman*, is unanswerable."

Justice Cole, in his opinion, says:

"And this brings up for consideration the question whether the president can suspend the privilege of the writ in respect to all persons held under military control. In other words, the inquiry is, whether, under the Constitution, the suspension of the writ is a legislative or executive act. It appears to me that it is the former. To suspend, annul, or take away a right given by law is, under our system of government, essentially a legislative function. To deprive a citizen of the privilege of the writ of *habeas corpus* is to take from him one of the highest and most sacred rights secured to him by the Constitution and laws of the land. It is a change of the law, which, from the nature of things, belongs to the power which can make the law. I do not now refer to the case where the president may declare martial law. When he does this it is by virtue of the war power. And where martial law prevails, it destroys for the time being, all civil authority and every legal right. This is admitted. But the inquiry is, Can the president suspend the writ of *habeas corpus, or must it be done by an act of congress. I think it involves pre-eminently the exercise of legislative power.* There may be cases where, for the best of reasons, the president might refuse to make return to a writ. Such cases have occurred during the progress of the rebellion, and doubtless will occur again. But I do not refer to such a case. The inquiry is directed to the point whether the Constitution confers upon president or Congress the power to suspend the writ in cases of rebellion or invasion when the public safety may require it. *I think the*

power is given to congress. But I shall not attempt further discussion of the question. The whole argument has been exhausted by the public press, in the debates in congress upon this subject, and by various judicial authorities which have examined the question. *To my mind the decided weight of authority, as well as force of reason, are upon the side of those who deny the right of the president to suspend the writ.* And with this remark I pass from the point."

Justice Paine said:

"Whether the writ of *habeas corpus* is legally suspended or not, depends entirely upon the question whether it requires an act of congress to suspend it, or whether it may be done by the president alone. And this has recently been so fully and ably discussed, that whoever is now called on to decide it can do little more than to indicate which side of the argument he adopts. For myself, *I entertain no doubt that it requires an act of congress. The power to issue the writ is given by law. It requires a law to change a law, and the president cannot make a law.* This argument, derived from the nature of the act to be done, and that derived from the fact that the prohibition is found in the article of the Constitution relating to the legislative power, and among other prohibitions which are acknowledged limitations upon that power, are so clearly stated in the recent opinion of Chief Justice Taney in the *Merryman case*, that it would be a repetition to go over the same ground.

* * * * * * * *

"It was to meet this necessity that the Constitution allowed the writ to be suspended in cases of invasion or rebellion, when the public safety required it. It is based upon two assumptions. First, that judicial tribunals, so long as the writ is not suspended, are compelled to issue it on proper application, and to decide upon the legality of the imprisonment according to the existing law. Second, that the public safety may, in the excepted cases, sometimes require that the officers of the government should be relieved from such inquiry. To accomplish this, the writ must be suspended; and the question is, Where was the power lodged?

"From its very nature, it would not naturally have been entrusted to a single man, and that man at the head of the military. It is a power dangerous anywhere. It delivers over the nation, for the time being, to the control of the executive. It makes him substantially what the Roman dictator was. No single officer should be allowed to assume such powers upon his

own judgment only. The nation that is to be subjected to them should have some voice in determining when the necessity arises for their existence. And as in Rome there was no officer who could assume the power of a dictator upon his own judgment, but such officer had to be appointed by a vote of the senate, so here the power to suspend the writ of habeas corpus would naturally have been entrusted to the legislature, and not to the executive alone. There the Constitution has placed it. So the Supreme Court of the United States has declared. So it has been held by every judicial decision, and every elementary writer on constitutional law.

"The people, in adopting the Constitution, added an amendment, article 3, which provided that no soldier should be quartered in any house in time of war, except *'in a manner to be prescribed by law.' Can it be possible that a people who were thus careful to guard themselves against the uncontrolled judgment of military officers in one particular, could have intended to leave those officers the power to seize and imprison all citizens, and suspend their ordinary legal remedies, without any law declaring the existence of such a necessity?*

"I have read the letter of the attorney general of the United States upon this subject, in answer to a resolution of the house, dated July 5, 1861. I am compelled to say that its reasoning seems to me wholly unsatisfactory. He claims the power for the president, and through him for his subordinate officers, to refuse obedience to the writ without any act of Congress suspending it. His argument, if I understand it, and I have endeavored to do so, is to a great extent based upon the following propositions. He says, first, that the executive is one of the co-ordinate departments of the government. He next asserts the general doctrine that these departments are co-equal, each independent in the exercise of its own functions. And then upon these propositions he bases what seems to me the extraordinary conclusion that for the judicial department to call upon the executive or his subordinates, by the writ of *habeas corpus*, to show by what authority they imprison any person, is an improper attempt to interfere with the executive department, which may be justly disregarded by the president or any officer acting under his directions.

"The propositions relied on are undoubtedly, in a general sense, true. But that they could ever have been conceived to have such an extent and application as is here claimed, I should, before seeing this letter, have thought impossible. The several departments are co-equal, and each in the exercise of its own duties independent of the others. But it by no means follows

that the duties of each can not be affected, regulated or even prescribed by the others. On the contrary, it is clear that all this may, and ordinarily does, take place. The executive calls the legislature together. It is their duty to obey that call; but that is not yielding to any improper attempt by the executive to control the legislature, for the power to call them together is his appropriate function. So the legislature enacts laws, prescribing duties for the executive to perform; prescribing, also, duties for the judicial department, and regulating its modes of action. This is no attempt to interfere with the freedom of these departments; for to do these things is the province of legislation. And by precisely the same reasoning, when the executive or any of his officers is called on to obey a writ of *habeas corpus*, and show by what right he imprisons any person, there is no improper attempt to interfere with the executive department, because the power to issue such writ and to decide upon the legality of every imprisonment is the special and peculiar function of the judiciary. Each department, therefore, while free and independent in its own sphere, must respect and give due effect to the appropriate functions of the others, and this is all that would be done by the president and his officers in obeying the writ of *habeas corpus*.

"The argument, if good at all, is as good in peace as in war, for the departments are as free and independent in one case as in the other. And if to call on the president and his officers to show cause for the imprisonment of any person is an unwarrantable attempt by the judicial department to control the executive, in time of war, it would be equally so in time of peace; and the result would be an absolute and perpetual exemption of those officers from all obligations to obey the writ. I had not supposed it necessary, at this day, to contend against such a proposition. That interference, which is really improper between the different departments, is where one denies to the others their appropriate powers, and attempts to assume them itself. Such would be the case should the president assume the legislative power of suspending the laws, or the judicial power of deciding upon the legality of imprisonment.

"The attorney general repeats the saying often heard, that the liability of a power to abuse is no argument against its existence, inasmuch as all power may be abused. This may be true. But where the danger of abuse is infinitely greater if entrusted to one man, that is a good reason why, as a matter of policy, it should not have been entrusted to him, and why, as a matter of law, it should be held to belong to the legislature, if the Constitution placed it there.

"The remainder of the attorney general's argument is based upon the general necessity of suppressing the rebellion, to which I may have occasion hereafter to refer, and upon the necessity arising from the prevalence of martial law and the exigencies of military duty to which I have already referred, and, while admitting that they might justify an occasional temporary disregard of the writ, as of all other civil authority, have endeavored to show that this did not constitute the suspension contemplated by the Constitution. That conclusion seems to me also to be clearly indicated upon the face of the provision itself. It evidently assumes that, except for its existence, the writ might be suspended at any time. Now, it would hardly be claimed, by the most extravagant asserter of executive power, that the president could suspend the writ in time of peace. Yet, the prohibition evidently assumes that the power on which it was imposed might do so. Hence it had reference to the legislative power.

"For these reasons, although the proclamation of the president professes to suspend the writ, I can not regard it as legally entitled to that effect."

In

Griffin vs. Wilcox, 21 Ind., 370 (1863),

it is said:

"We do not think he (the president) possesses that right (the right to suspend the writ of habeas corpus) under the Constitution. We think that is an act of legislative power which can only be performed by congress." * * *

"But, in all parts of the country where the courts are open, and the civil power is not expelled by force, the Constitution and laws rule, the president is but president, and no citizen, not connected with the army, can be punished by the military powers of the United States nor is he amenable to military orders. (See Skeen vs. Monkeimer, ante, page 1.) If, in such parts of the country, men commit crimes defined by law, they must be punished, according to the Constitution and the law, in the civil courts. If, in such parts of the country, men have not perpetrated acts constituting, in law, crimes, their arrest, trial and punishment by military courts is but a mode of applying Lynch law; is, in short, mob violence. This is so, unless the old English tory doctrine of government is secretly included in our Constitution. That doctrine, as expressed by Filmer, is that 'a man is bound to obey the king's command against law; nay, in some cases, against divine law.' May's

Const. Hist., volume II, page 21, note. Such was the maxim, the Constitution, indeed, of imperial Rome. *'Quod principi placuit legis habet vigorem.'* What pleases the prince has the vigor of law. (Coop. Just. Inst., page 9; 1 Black. Comm., page 74."

On page 388 of said opinion the court says:

"Resistance to illegal arrests and mob violence is not necessarily resistance to the government. The courts in all the Northern states are, and have been, open."

In the case of

Warren vs. Paul, 22 Ind., 276,

decided in 1864, the Supreme Court of Indiana reaffirms its views, that to congress is given the power of suspending the writ of habeas corpus.

In 1867 the question of the right of the president of the United States to suspend the privilege of the writ of habeas corpus prior to the passage of the act of congress of March 3, 1863, came before the Circuit Court of the United States for the district of California in the case of

McCall vs. McDowell, Deady, 233 (Fed. Case No. 8673),

and the judges were unanimous that no such power existed. Judge Deady, in delivering the opinion of the court, said:

"That proclamation professes to suspend the writ of habeas corpus and to declare martial law. The expression martial law may be passed over as merely cumulative. It means nothing but the absence of law. But the president of the United States has no authority to suspend the privilege of the writ, except as authorized and directed by congress, and at the date of this proclamation no such authority existed. *I do not propose to argue the question. There are some things too plain for argument, and one of these is, that by the Constitution of the United States the president has not the power to suspend the privilege of the writ, and that congress has. The power of the president is executive power—a power to execute the laws, but not suspend them. The latter is a legislative function, and, so far as it exists, belongs naturally and by force of the Constitution, exclusively to congress.* See opinion of Chief Justice Taney in Ex Parte Merryman (case No. 9487), and authorities there cited.

"Whatever may have been the public necessities and motives which led the president to issue this proclamation—and I neither question nor impugn them—I cannot hold that it constitutes a defense to this action, because, judicially, I know that it was unauthorized and void."

In 1870, in "reconstruction days," the question of the power of the governor of North Carolina to suspend the privilege of the writ of habeas corpus came before the chief justice of the state of North Carolina in the case of

Ex Parte Moore et al., 64 N. C., 802.

On the 16th day of July, 1870, certain citizens of that state presented their petitions for writs of habeas corpus to the chief justice at chambers, alleging that they were detained by one Kirk, under show of military force. The writs were issued, returnable immediately. Two days later the party making the service made a report that the writs had been delivered to the respondent, who was in command of the military force of the state, and that said officer had stated that he would not surrender the prisoners except on the order of the governor. The chief justice thereupon adjourned the hearing and wrote the governor, inquiring if the respondent, in making no return, was acting under the orders of the governor. Counsel representing the governor thereupon appeared and read a communication from the governor to the effect that *he had declared the county in which the arrests were made in a state of insurrection, and that it was under military law.* The matter of the governor's power was thoroughly argued and a few days later the court delivered its opinion, holding that the governor had no power to suspend the writ of habeas corpus. The opinion in reference to the power of the governor to refuse obedience to the writ of habeas corpus is as follows:

"As to the second, it may be that the arrest and also the detention of the prisoner is necessary, as a means to suppress the insurrection. But I cannot yield my assent to the conclusion; the means must be *proper* as well as necessary, and the detention of the petitioner as a military prisoner is not a proper means. For it violates the Declaration of Rights, 'The privilege

of the writ of habeas corpus shall not be suspended.'—Constitution, article I, section 21.

"This is an *express* provision, and there is no rule of construction or principle of constitutional law, by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses shall be construed so as to give effect to each, and to prevent conflict. This is done by giving to article XII, section 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, *but requiring, by force of article I, section 21, the persons arrested to be surrendered for trial, to the civil authorities on habeas corpus, should they not be delivered over without the writ.*

"This prevents conflict with the habeas corpus clause, and harmonizes with the other articles of the 'declaration of rights,' i. e., trial by jury, etc., all of which have been handed down to us by our fathers, and by our English ancestors, as great fundamental principles, essential to the protection of civil liberty.

"I declare my opinion to be that the privilege of the writ of habeas corpus has not been suspended by the action of his excellency; that the governor has power, under the Constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power.

"The judiciary has power to declare the action of the executive, as well as the acts of the general assembly, when in violation of the Constitution, void and of no effect. Having conceded full faith and credit to the action of his excellency, *within the scope of the power conferred on him*, I feel assured he will in like manner give due observance to the law as announced by the judiciary. Indeed, he cannot refuse to do so, without taking upon himself the responsibility of acting on the extreme principle, 'The safety of the state is the supreme law.' I will venture to hope, as evil as the times may be, our country has not yet reached the point when a resort to extreme measures has become a public necessity."

A copy of this opinion was transmitted to the governor, who, on July 26, 1870, replied that the safety of the state de-

manded that he refuse to obey. The chief justice thereupon held that he had done all he could do, and that he would not plunge the state into another civil war by undertaking to release the prisoners by force. Thereafter, counsel for the prisoners obtained writs of habeas corpus from the judge of the United States District Court, returnable on August 18. The governor thereupon wrote the chief justice of the Supreme Court that he would make return to the writs in the state court, and the prisoners were surrendered to the civil authorities. At the same time the attorney general applied for bench warrants against some of the prisoners, charging them with murder, and the court held some of them for trial on that charge. On the same day on which the prisoners were surrendered by the militia to the Supreme Court, a large number of the prisoners were surrendered to the United States District Court, who discharged them and who also issued a warrant against one of the military officers to compel him to give security for the peace. (See 64 N. C., 832.) What the Supreme Court of Colorado was thinking of when they cited this case as an authority for the majority opinion, remains to the imagination of the person considering it.

In re Sparks, 27 Texas, 706.

Johnson vs. Jones, 44 Ill., 142.

THE IDAHO DECISION, CITED IN THE MAJORITY OPINION.

In 1899 the question came before the Supreme Court of Idaho, and is reported in the case of In re Boyle, 57 Pac., 706.

On the 4th day of May, 1899, the governor of the state of Idaho issued a proclamation declaring Shoshone county in a state of rebellion and insurrection.

After the issuance of this proclamation the president of the United States, at the request of the governor, sent troops to said county. One William Boyle was arrested and confined by the troops. He applied to the Supreme Court for a writ of habeas corpus. The respondent was permitted to file a general demurrer to the petition—a singular and unusual proceeding.

The case was heard by the court on the petition and demurrer. The demurrer was sustained and the petition dismissed. The opinion is as follows:

"This is an application for a writ of habeas corpus. To the petition a general demurrer is filed. The only question presented for our determination is, Does the petition state facts entitling the petitioner to the writ? The petition alleges the illegal detention of the petitioner, and sets forth alleged cause of, and authority for, such detention; and it is upon the alleged illegality or want of authority therefor that petitioner bases his right to the writ. As to the facts set up in the petition, so far as not contradictory or conflicting, for the purposes of this decision, in so far as they are assumed to be true, do they constitute sufficient ground for the issuance of the writ? It appears from the petition: That on the 4th day of May, 1889, the governor of the state of Idaho issued the following proclamation: 'State of Idaho, Executive Office. Whereas, It appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and,

"'Whereas, The civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence; and,

"'Whereas, On Saturday, the 29th day of April, 1889, at or near the town of Wardner Junction, in said county of Shoshone, state of Idaho, an armed mob did then and there wantonly destroy property of great value, with attendant loss of life; and,

"'Whereas, Said destruction of property, with attendant loss of life, by mob violence, as above set forth, is but one and a repetition of a series of similar outrages covering a period of six years or more just passed, the perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men; and,

"'Whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Shoshone are entirely unable to preserve order and protect property; now, therefore, I, Frank Steunenberg, governor of the state of Idaho, by virtue of authority in me

vested, do hereby proclaim and decree the said county of Shoshone, in the state of Idaho, to be in a state of insurrection and rebellion. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the state. Done at the city of Boise, the capital of the state of Idaho, this 4th day of May, A. D. 1899, and of the independence of the United States of America, the one hundred and twenty-third.

"FRANK STEUNENBERG.

"'By the Governor.

"'M. PARRIE, Secretary of State.'

"That thereafter upon the call of the governor, a military force was sent into said Shoshone county by the president of the United States, which proceeded at once to secure the arrest of the parties engaged in, and who committed the outrages of the 29th of April, for the purpose of bringing such parties before the proper tribunal for trial. Among the parties who were arrested as being implicated in the murders, and other crimes resulting from the insurrection, riot, or rebellion of the 29th of April, was the petitioner, and he bases his claim to be discharged from such arrest upon various grounds: (1) No insurrection, riot or rebellion now exists in Shoshone county. (2) The governor has no authority to proclaim martial law or suspend the writ of habeas corpus. (3) That martial law does not exist in Shoshone county and has not been proclaimed in said Shoshone county by any one having authority to make such proclamation. (4) That the little disturbance of the 29th of April is over; that the parties implicated in it, after having destroyed about $250,000 worth of property and committed several murders, have retired to their homes, and that in recognition of the inalienable rights of the citizen, they ought not to be disturbed. (5) That the governor has no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the federal government to assist in putting down the insurrection and restoring order in said county.

"Counsel have argued ably and ingenuously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative and executive power of the government; but, from our view of this case, that question cuts no figure.

"We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demand for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued.

"The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does, and has, existed in Shoshone county for the past six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the military of the state, or of the federal government, to suppress such insurrection and re-establish permanently the ascendency of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

"Section 7405 of the Revised Statutes provides:

"'When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the direction of any civil officer, it must obey the orders in relation thereto of such civil officer.'

"The facts set forth in the governor's proclamation warranted his action. It is true that some of the facts recited therein are negatived by averment in the petition, which would seem to put in issue the truth or falsity of those recitals. On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed.

"The action of the governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county.

"Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of the government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties and kill and injure citizens, thus defeating the ends of government, and the government unable to take all needful and necessary steps to restore law and maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in

a state of insurrection, and for this reason the proclamation was without authority.

"The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make such application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty.. Under the circumstances it was the duty of the executive to act without any application from any county officer of Shoshone county.

"This conclusion is based upon what we deem a correct construction of the provisions of our Constitution and statutes in force, construed in pari materia. It having been demonstrated to the satisfaction of the governor, after some six or seven years' experience, that the execution of the laws in Shoshone county, through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insure the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to hinder, delay, or place obstruction in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their power in his efforts to bring about the consummation most devoutly prayed for by every good and law-abiding citizen in the state. The various questions raised by counsel have been considered by the court, and it is our conclusion that the petition does not state facts which show that the writ demanded ought to issue; wherefore the said demurrer has been sustained, and the writ denied."

It will be seen from the foregoing opinion that the Idaho court lays down the following propositions, to wit:

First—That it "cuts no figure," to use the court's own language, whether the authority to suspend the writ of habeas corpus rests with the legislative or executive power.

Second—That whenever, for the purposes of putting down insurrection or rebellion, the exigencies of the case demand it, the executive, *or the military officer in command,* may suspend the writ of habeas corpus.

Third—That the truth of the facts recited in the governor's proclamation can not be inquired into.

Inasmuch as this opinion formed the sole and only authority in any land where constitutional rights exist, for the action

of the governor of the state of Colorado before the Supreme Court of that state rendered its majority opinion sustaining him, it becomes our duty to consider it carefully.

It is subject to many criticisms, which absolutely destroy its force and effect as an authority.

In the first place, the opinion says that the constitutional question of whether the suspension of the writ of habeas corpus is a matter for the executive, or the legislative branch of the government, "*cuts no figure in the case.*" Let us pause just a moment here to catch our breath after reading this remarkable declaration of a court of justice.

Counsel for the military authorities were contending that the Constitution gave the governor the power to suspend the privilege of the writ, and that his proclamation had suspended it. Counsel for the prisoner contended that this power was vested alone in the legislature. Yet the court actually says there is no such question in the case. Why wasn't there such a question? The military authorities were relying upon the authority of the governor in the premises. But these learned Idaho justices discover a new principle, and that is, that the Constitution has nothing to do with it. No court in Christendom had ever before laid down such a principle of law. No similar language can be found anywhere else in a judicial opinion. Theretofore the courts had fought out the question by discussing the Constitution and endeavoring to learn its meaning. The Idaho constitutional provision in reference to the suspension of the writ of habeas corpus reads as follows:

"The privilege of the writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety requires it, *and then only in such manner as shall be prescribed by law.*" (Section 5, article I.)

This provision is the same provision found in the Colorado Constitution, with the exception that that portion of the Idaho section which we have italicized is not in the Colorado section.

Nothing can be clearer than the Idaho constitutional provision which we have quoted. The people who adopted that Constitution attempted to settle the question as to the suspension of the writ of habeas corpus, by providing that it could

only be suspended in accordance with some law passed by the legislature. There was no room for serious debate as to what this provision meant. It meant clearly that the governor had no such power. And if the court had to pass on the question directly it would have had to hold that. So the court dodges, or attempts to dodge, the question by saying that the question cuts no figure. Again we ask, Why didn't it "cut a figure?" If the constitutional provision emphatically prevented the governor from suspending the writ, the Constitution controlled the case then before the court, and the writ should not have been denied. No judge in all the land had ever dodged the question before. One and all, from the days of John Marshall down, had held that the question of whether an executive could suspend the writ of habeas corpus depended on a proper construction of the Constitution. Even Judge Smalley, in attempting to sustain the power of the president to suspend the writ, placed the power to do so on his construction of the Constitution. But the Idaho court says the Constitution has nothing to do with the question.

But, more wonderful still, the Idaho court follows this remarkable declaration with the statement *that not only has the governor the power to suspend the writ, but that a mere military officer can do so.*

If the governor of Idaho and the military officers have such power, where does it come from? It must come from some law on the subject. Where is there such a law? The court does not attempt to point out such a law, and for the good reason that none such existed in Idaho. On the contrary, the supreme law of Idaho—the Constitution—expressly forbade the exercise of such a power. How, then, does the Idaho court attempt to justify such a conclusion? The answer is not far to seek. Boiled down, the conclusion of the court is, that public necessity demands that the governor should have such a power. They say that the action of the executive can not be interfered with or impeded by the judiciary. They say that the courts should not be

"made a sanctuary, a city of refuge, *whereunto malefactors may flee for protection from punishment justly due for the commission of crime.*"

Such a statement by any court should arouse the just indignation of every lawyer and judge who understands anything about the nature of the writ of habeas corpus. It is the first time any court of justice ever undertook to brand a man as criminal, and say that he was fleeing from punishment justly due him, when he came into court, protesting his innocence, and asked to have his accusers face him with any criminal charge they might have against him. The Idaho opinion not only overturns, or attempts to overturn, the law that the Constitution must control the governor and the militia, but it also attempts to do away with the presumption of innocence which the courts have ever thrown as a protecting cloak around the citizen. We say that the Idaho decision is far from being a credit to the judiciary, and we shall hereafter show, beyond controversy, that the opinion even perverts the court's own records, and slanders the petitioner in order to find some excuse for such a holding.

But, going back to the ground of public necessity presented by the court for its holding, that the governor, or perhaps even a soldier, drunk with this new-found power, may defy the courts and refuse to obey its writs, we want to comment for a few moments upon this doctrine or claim of public necessity.

Such a position had never been sustained by any other court in the land. It has been presented time and time again, and ever repudiated . It was always presented in England in support of the tyranny of the king, and the people ever fought the doctrine, until finally the question was set forever at rest. It was again applied in the colonies in support of the acts of the crown, and the colonies rose in rebellion, and declared in ringing terms that the prince who would declare such a doctrine was unfit to be the ruler of a free people. It was urged again in the courts of Louisiana, in 1815, in support of the actions of General Jackson, and the Supreme Court of that state unanimously set its seal of disapproval on the claim. It was urged by General Jackson himself before the United States Circuit Court in Louisiana, and that court mulcted him in a heavy fine. It was urged again by "pure patriots" during the

early years of the war, and repudiated by every judge in the land, including Judge Smalley.

When congress met in 1863 it was urged upon congress that an act should be passed, giving to the president a free hand to suspend the writ in all cases, and for as long as he pleased. But congress, composed of loyal sons of the Union, emphatically repudiated the theory that such a power could exist in a land of Anglo-Saxon people, and passed a law which was really a restriction upon the power that the president had been exercising and which made him inform the courts of all men arrested and compelled their release unless the grand juries indicted them. It compelled the officers to obey writs of habeas corpus and orders for the release of prisoners. Yea, it went further, it allowed any citizen to bring a writ of habeas corpus for a United States prisoner who was not indicted, and compelled his release. This act is commented upon and set out in the great case of Ex Parte Milligan, 4 Wall., 2, and the second and third sections of the act authorizing the suspension of the writ are declared to be a limitation on the power of the president. Judge Davis says of this act:

"The president was authorized by it to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

"It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

"The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the congress can not be mistaken. The public safety demanded, if the president thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The secretaries of state and war were di-

rected to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the president, and who were citizens of states in which the administration of the laws in the federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose."

But, to get back to our comments on the Idaho opinion. Its claim of necessity was advanced by the governor of the state of North Carolina in 1870. In a letter to the chief justice, which we have heretofore called attention to, he urged upon the court that it was absolutely necessary that the court should permit the prisoners to be held. Again was the doctrine repudiated.

Over and over again, in case after case, has the doctrine been stamped into the earth.

But in 1899 we find the Supreme Court of Idaho calmly asserting it to be the law of the land.

Not a single decision of any court in the land is cited by the Idaho court to support its holdings. None can be cited.

The Idaho court says that the government may, like an individual, act in self-defense. Certainly, but neither it nor its representatives can do an *unlawful act* in self-defense. The individual who acts in self-defense does so under the law. He can always find the law which expressly and emphatically gives him the right to kill in self-defense. He, therefore, in killing in self-defense, obeys the law. The governor must be able, when he goes to act in self-defense of the state, to point to the law which justifies the act. If, as a means of ending the insurrection, he desires to suspend the writ of habeas corpus, he must

find some power in the statutes or Constitution. Otherwise he is breaking the law to enforce the law. If he may safely break one law, he may break another. He may commit murder, assassinate men, aye, become a second Nero, if in his judgment it is essential to the safety of the state so to do. Not so. In restoring the law he must do it by lawful means.

We have heretofore in this brief announced that we would show that the Idaho court was driven to misstate its own records in order to sustain its holding, and we shall now do so. In the opinion every effort is made to show that the petitioner was a confessed malefactor and criminal; that his own petition so showed. There is a studied and determined effort upon the part of the court to so make it appear. For instance, the court says that it appears from the petition that the petitioner was arrested as being implicated in the murders and other crimes resulting from the insurrection, and that he bases his claim to be discharged from such arrest upon various grounds.

"(1) No insurrection, riot or rebellion now exists in Shoshone county. (2) The governor has no authority to proclaim martial law, or suspend the writ of habeas corpus. (3) That martial law does not exist in Shoshone county and has not been proclaimed in Shoshone county by any one having authority to make such proclamation. (4) That the little disturbance of the 29th of April is over; that the parties implicated in it, after having destroyed about a quarter of a million dollars of property, and committed several murders, have retired to their homes; and that, in recognition of the inalienable rights of the citizen, they ought not to be disturbed. (5) That the governor had no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the federal government to assist in putting down the insurrection and restoring order in said county."

The court then goes on to say that it is not a refuge or sanctuary "whereunto malefactors may flee from punishment justly due for the commission of crime."

It thus appears from the court's opinion that the petitioner admitted that he was arrested for murder and other crimes, and that in his petition he claimed that "the little disturbance of April 29 was over, and the criminals had retired to their

homes; *and that in recognition of the inalienable rights of the citizen they ought not to be disturbed."*

The Idaho court puts these statements in quotation marks, as being statements in the petition.

According to the opinion the petitioner did not claim that he was an innocent man, but put his right to be released on the ground that the "little disturbance" was over, and he had an inalienable right to be undisturbed. Doesn't it strike one as being singular that any petitioner would embody such allegation in his petition for a writ of habeas corpus?

The truth is that the petition did not contain any such allegations. The petitioner claimed to be absolutely innocent of any offense, and made no such allegation as that he was one of the parties connected with the offenses mentioned in the governor's proclamation; but, on the contrary, expressly denied that he had anything to do therewith. He did not, as stated by the court, belittle the offense which had been committed, or call it "a little disturbance," or make any such outrageous claim that any perpetrator of an outrage had an inalienable right not to be disturbed. That we will not be thought unjust in these criticisms of the conduct of the Supreme Court of Idaho we have secured a certified copy of the petition in said cause, which is in words and figures following, to wit:

"IN THE SUPREME COURT OF THE STATE OF IDAHO.

"In the matter of the application of William Boyle for a writ of habeas corpus:

"Your petitioner, William Boyle, petitioning for a writ of habeas corpus herein, respectfully showeth to the court that he, your petitioner, at all the times mentioned in this petition was, and now is, a citizen of the state of Idaho, and a resident of Shoshone county, and a duly qualified and acting member of the board of county commissioners of said county.

"That on or about the 6th day of May, A. D. 1899, at the town of Wardner, in said county of Shoshone, your petitioner was peaceably residing with his family. Whereupon, on said date, an armed body of soldiers, together with other persons to this petitioner unknown, with force of arms and without any legal process or warrant of law, took the person of your petitioner into custody. That said soldiers and other armed per-

sons at said time were acting under the control and direction of one Bartlett Sinclair, and the said Bartlett Sinclair, ever since that date, with force of arms, and against the will of your petitioner, has wrongfully, unjustly and without warrant of law, restrained, and does continue to so restrain your petitioner of his liberty. And ever since said date the said Bartlett Sinclair has kept and imprisoned this petitioner in a certain improvised prison known as a 'stockade,' at Wardner Junction, a small village near the town of Wardner, Shoshone county, Idaho, where your said petitioner has been at all times guarded by said soldiers and restrained of his liberty, and denied an opportunity to freely and seasonably consult counsel.

"That the illegality of the imprisonment and restraint of your petitioner consists in this:

"That on or about the 29th day of April, A. D. 1899, a riotous assemblage, as your petitioner is informed, consisting of a large number of persons, went to the mill and concentrator of the Bunker Hill and Sullivan mine and destroyed the same by the use of explosives and other means, and at said time several persons were killed by gunshot wounds.

"That immediately upon the said mill being blown up and destroyed the said persons, whoever they might be, dispersed and left the scene of the said riot.

"That thereafter, and on the 3d day of May, A. D. 1899, the governor of the state of Idaho issued the following proclamation:

"(Here follows a copy of the governor's proclamation declaring the county of Shoshone in a state of insurrection and rebellion.)

"That it is claimed that under and by virtue of said proclamation the governor appointed the herein mentioned Bartlett Sinclair as a representative at said Shoshone county, and the president of the United States assigned H. C. Merriam, a general of the United States army, to proceed to said Shoshone county and to act therein, under the direction of said Bartlett Sinclair, and the said soldiers hereinbefore referred to were a part of the military force of the United States, claiming to act under the direction of said Bartlett Sinclair and the said H. C. Merriam.

"That at the time of the said proclamation of the said governor of the state of Idaho, and at Wallace, within said state, one Alexander Mayhew was then and there the duly elected, qualified and acting judge of the Circuit Court of the First Judicial District of the state of Idaho. That said judge on said date was in the full and complete exercise of his judicial functions, without hindrance or opposition, and said court, being a

court of general jurisdiction, was authorized and empowered to issue civil and criminal process, and was at said time and place exercising all of the functions, as aforesaid, and ever since said date the said court has continued to be, and is now, open for the purpose of administering, and is now administering, the law under the Constitution of the state of Idaho, and that said court has never been closed. That said judge and the clerks of the court and one Hugh France, coroner and acting sheriff, because of the arrest and imprisonment of James Young, the sheriff of said county, have continued to act as such civil officers without opposition or obstruction.

"That, although frequently demanded by this petitioner, the said Bartlett Sinclair has failed and refused to inform your petitioner of the nature and character of the charge against him, and has informed your petitioner that he was arrested because of suspicion existing in the mind of said B. Sinclair that this petitioner was a member of said riotous assemblage, and that by virtue of said proclamation of the governor, and by virtue of said claimed appointment on the part of said Bartlett Sinclair, no judicial or other process from any civil or committing magistrate was needed to authorize the said Bartlett Sinclair to restrain your petitioner of his liberty, but that, by virtue of the said proclamation, the said governor had proclaimed martial law and had suspended the writ of habeas corpus in said county of Shoshone, and that he, the said Bartlett Sinclair, was the judge of the legal, as well as the civil, rights of your petitioner, and that no court had the right to bring the body of your petitioner before it or to order the release of your petitioner until such time as the said Bartlett Sinclair, by investigation or otherwise, had determined whether or not he should, or should not be discharged, and that your petitioner was held by virtue of the power and authority vested in the said Bartlett Sinclair, by virtue of said claimed appointment of the governor and proclamation aforesaid, and because martial law was proclaimed thereby, and the power of the court in the premises suspended.

"Your petitioner further showeth that the said proclamation of the governor did not declare, or purport to declare, that the said county of Shoshone was under martial law, and the said proclamation of the governor did not suspend, or purport to suspend, the writ of habeas corpus, and, under the Constitution of the state of Idaho, and of the United States, and the laws of said United States and of the state of Idaho, the said governor of said state is not authorized to suspend the writ of habeas corpus, and the said writ of habeas corpus cannot be suspended, as claimed.

"That the said county of Shoshone, though occupied by military forces, is now peaceable, and there is no armed opposition to the enforcement of process. That no process was ever issued out of the said court of Shoshone county, or any committing magistrate, though the same was open for such purposes, and no such process had been resisted, and no process issued by said court, or any court of Shoshone county, was opposed by any person or persons, and more especially your petitioner.

"Your petitioner, at all the times herein mentioned, was ready and willing to obey all lawful orders and process of civil courts of the state of Idaho, and at no time resisted or assisted in resisting or combined or confederated with any person who had resisted, or proposed to resist, if any such there were, the lawful authority of the state of Idaho. That the said county of Shoshone is now in a state of peace, and not of war.

"That no resistance has been met by said military authorities or the authorities of said Shoshone county in the execution of the law.

"That your petitioner has not committed the crime of murder, is not in the military or naval forces of the United States, has not committed the crime of treason against the government, has been guilty of no violation of the laws of the state of Idaho, has done no act subsequent to the said declaration of martial law or prior thereto that warrants his arrest or detention.

"That no warrant has ever been issued, as aforesaid, against your petitioner, so far as your petitioner is informed; no indictment has been filed against your petitioner, no complaint under oath has been lodged against him before any committing magistrate, and the detention, arrest and imprisonment of your petitioner is entirely at the will of the said Bartlett Sinclair.

"That one William Stimson, together with this petitioner, filed application for a writ of habeas corpus before the said Honorable Alexander Mayhew, judge aforesaid, setting forth matters and facts herein set forth, but said Alexander Mayhew failed and refused to entertain the application of said William Stimson, and this petitioner, in view of said decision, says it would be of no avail for this petitioner to appear before said Honorable Alexander Mayhew with a writ for a discharge from custody, and that the said Stimson can not pursue an appeal to this court, because immediately after said adverse decision of said Alexander Mayhew, judge of the court aforesaid, the said William Stimson was discharged by the said Bartlett Sinclair.

"That the said military authorities are subordinate to the civil authorities in the county of Shoshone.

"That the said civil authorities, with the aid of said military authorities, if not otherwise, are fully capable of administering the legal rights of all parties.

"That the civil authorities aforesaid can, and ought to, forthwith adjudge the rights of this your petitioner.

"Wherefore, your petitioner prays that a writ of habeas corpus may issue herein, directed to the said Bartlett Sinclair, ordering and directing him to produce the body of your petitioner before your Honors at a time and place to be fixed in said order herein.

"Respectfully submitted,

"WILLIAM BOYLE.

"PATRICK REDDY,
"F. C. ROBERTSON,
"Att'ys for Petitioner.

"STATE OF IDAHO, COUNTY OF SHOSHONE, ss.

"I, William Boyle, being first duly sworn, on oath, depose and say: That I am the petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the same are true.

"WILLIAM BOYLE.

"Subscribed and sworn to before me this 18th day of May, 1899.

"J. E. GYDE,
"(Seal) Notary Public."

Endorsed: "Filed May 22, 1899."

"I, Sol. Hasbrouck, clerk of the Supreme Court of the state of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original petition for writ of habeas corpus in the above entitled cause, on the 22d day of May, A. D. 1899, and now on file in my office.

"Witness my hand and the seal of the court this 5th day of September, A. D. 1903.

SOL. HASBROUCK,
"(Seal) Clerk."

Are we not justified in our criticism of the Idaho court, that it misstated its records when, with a petition on file, it in effect says that the petitioner was a confessed malefactor? This, in the face of the fact that the petitioner declared his innocence, and that the demurrer filed to the petition confessed its allegations to be true.

But it may be said that we have no right to go behind the returns and show the real record in the case, and that the only

thing to be considered is whether or not the opinion on its face is good law. We say not so. We have the right to show anything from the record that will rob this case of its effect as an authority. We have the right to show that it was rendered in a time of such excitement that the cool judgment of the court did not exist, but, instead, that the judges' minds were inflamed with passion that they even went to the extent of making up facts to lend color to such an opinion.

But if it be true that we have no right to look beyond the opinion and that every statement made in it in reference to the petitioner's pleading must be taken as true, then it is clear that no such case is authority in the case at bar. A self-confessed malefactor appeals to a court to be protected from crimes he admits and the court refuses him relief. What has such a case to do with the one at bar, where the petitioner alleges his innocence of any wrong, and demands that accusations be made against him and he be given an opportunity to defend himself in the courts?

But we are not yet through with pointing out the errors in the Idaho opinion. It says that in Shoshone county *martial law extended to "a limited extent."* No court before has ever used such an expression, and it is an interesting question to consider what is meant by it. What is this "martial law," which the court says extends *to a limited extent?* We can give no better answer to this question than to quote from the most excellent opinion given by Judges J. C. Helm and Platt Rogers and Mr. Harvey Riddell, to the governor of the state of Colorado, and which is printed in the report of the adjutant general of the state of Colorado, for the year 1896, and in which the following language appears:

"What is 'martial law,' and does, or can, it exist in Colorado under our Constitution?

"Martial law is the law of military necessity in the actual presence of war, administered by the general of the army; it is arbitrary; it is the will of the general who commands the army; it supersedes all existing civil laws; the commander is the legislator, judge and executioner; there may be, or may not be, a hearing upon charges, at the will of the commander; it is built upon no settled principles, but is entirely arbitrary

in its decisions. In reality it is no law, but something indulged rather than allowed as law.

"Anderson's Law Dic., 663, where many authorities are collected sustaining these definitions.

"Where actual war exists, between foreign nations, or when within the same nation a rebellion exists of such dimensions as amounts to a war between two nations, then the invading army which overthrows the opposing army, thereby supplants by force the existing authority in that country, or section of country, and out of the necessity for having some government, as well as for the safety of the conquering army, some law must be established, and out of this necessity grows the right and practice of establishing the will and discretion of the general of the successful army in the place of the overthrown government. Martial law has its rise in, and is limited by, this necessity. But it can be established only where there is an actual state of war; where, in case of insurrection in a nation, the very integrity of the state or nation is assaulted. It can not apply merely because there are infractions of the law, or where the law breakers, though too numerous to be controlled by the ordinary local civil authorities, aim not to overthrow the government itself, but merely to break the laws in that locality. the very definitions above given show it is unsuited to our institutions, and no stronger arguments can be made than such as naturally suggest themselves from the mere definitions alone.

"The authorities conclusively show that, at the common law, whence we derive the principles underlying our law, and which is, by express legislative enactment, made part of our laws, martial law was unknown and unauthorized as applied to the people governed by it. See the authorities collected by Woodbury, J., in Luther vs. Borden, 7 How., 46. Though the opinion of this justice was a dissenting one, there is no dispute among the authorities as to the correctness of his statements upon the point for which it is cited, and his opinion is the most valuable summary of law upon this point to be found in the books. In fact, the principal grievance against the house of Stuart, which led to beheading Charles I, and the settling of the crown of William III, was the attempted establishment, by the kings, of martial law. Though Wedderburn, as attorney general of England, had, in 1774, insulted Franklin, who had laid before the British government the grievances of the colonies, and particularly as to the use of the army, yet afterwards, as Lord Loughborough, chief justice of the Common Pleas, he decided, in 1792, that martial law 'does not exist in England at all.' That it was 'contrary to the Constitution,' and that 'it has been for a century totally exploded.' Grant vs. Gould, 2

H.; Blackstone, 98. It never existed at common law at all, and every pretense for its exercise had been unknown since the century before; since the accession of William III."

Numerous authorities which we have heretofore cited to the court fully sustain this opinion of these "three eminent lawyers and pure patriots," to use the language used by Judge Smalley, with reference to the president's advisers.

It thus appears that martial law is no law at all, but the mere arbitrary will of a military commander where actual war exists.

The Idaho courts say that martial law, i. e., no law at all, existed in Shoshone county, "to a limited extent." *"No law at all—to a limited extent."* Paradoxical, isn't it? Martial law has no limits. It is the law of might. The law is to kill, burn and slay if the commander orders it.

If martial law is to extend to *a limited extent,* who is to set the limit? Is it to be the officer in charge of the soldiers? If so, and he can judge of its "limits," then it is reasoning in a circle to say that it is limited at all. If the officer must be the judge of its limits, then indeed has the millenium come for the man opposed to strikes. The strikers, although guiltless of crime, may, by the military commander, be put on the chain gang as vagrants. They may be herded into bull pens. Their houses may be broken into. Their lawyers may be shot down in their own offices; the newspapers censored; every constitutional guaranty may be trampled under foot. *The policy of deporting them from their homes, their families, their wives and children, the most damnable, outrageous, unlawful and tyrannical policy ever indulged in, or attempted by any tyrant in all the world, may be carried out.* As was said in Ex Parte Milligan, 4th Wall., 2, *civil liberty and this kind of martial law can not endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.*

"There is no law for the government of the citizens, the armies or the navy of the United States within American jurisdiction which is not contained in or derived from the Constitution."

Again, it is stated in the Idaho case that the court's "conclusion is based upon what we deem a correct *construction of our Constitution and statutes* in force, construed in pari materia." It seems that the court then did construe the Idaho Constitution, although the opinion starts out by saying in effect that the Constitution "cut no figure," and that the whole thing was based on the law of "self-defense." Where are the statutes of the state which the court thought threw some light on the question? The court quotes no statutes and none existed which give any such right to the military authorities. It should also be remembered that Idaho has the same provision that Colorado has, requiring that the militia shall "always be in strict subordination to the civil power."

The conclusion is irresistible, it is overwhelming, that the Idaho court trampled upon and disregarded the fundamental law of the state, and that such a case furnishes no respectable support for any line of reasoning.

It was contrary to every other case in the Union.

It does not attempt to discuss precedents.

It cites no case in support of the views expressed therein.

It cites not a single line of the Constitution of Idaho in support of such a holding.

It cites no statute of the state in support of its holding.

It cites no text-book in all the land to sustain it.

It ignores, without discussion, all of the great decisions handed down by a glorious array of judges from the days of Marshall to the present time.

It violates the Constitution of Idaho, and sets at naught every provision in the Bill of Rights of that state.

It is contrary to the Constitution of the United States.

It makes the judiciary subordinate to the military.

It repeatedly contradicts its own statements, and turns and twists, and wriggles and squirms, in an effort to find something to justify its holding.

It misstates the records of its own court and brands a man as a self-confessed criminal, when the record shows that it was admitted that he was innocent.

It destroys every right for which our ancestors fought and struggled for hundreds of years.

It is a disgraceful and outrageous shame upon the judiciary.

We have now presented the cases to be found in the United States on the direct question of the suspension of the writ. Many other cases arising on incidental questions might be presented. One and all, they denounce such an attempt as has been here made to set up military rule.

We have only to add that the text-writers all unite in declaring that the power to suspend the writ of *habeas corpus* is vested alone in the legislative department. There is not a dissenting view on the subject.

Cooley's Const. Law, page 316.

Andrews' Am. Law, page 412.

Davis' Treatise on Military Law, page 321.

Ordronaux Const. Legis., page 220.

Winthrop's Military Law, page 1294.

Bishop's Crim. Law (7th Ed.), section 64.

Church on Habeas Corpus, sections 51 and 56.

Wharton Crim. Pl. and Pr., section 979.

Rapalje Crim. Pro., section 477.

Story on Const., page 214.

Am. and Eng. Ency. Law, volume 25, page 217.

We submit that in the matter now before the court the governor of this state was without any authority to suspend the privilege of the writ of habeas corpus; that he never attempted to exercise any such authority by proclamation or executive order; that the first knowledge that the courts could have of his claim that military necessity controlled the situation was that which arose when the answer was filed in the Supreme Court of Colorado; that to justify such a holding upon his part, even if he had the power, would require him to show that such a state of affairs existed that the courts were no longer engaged in the transaction of business; that whenever the civil power is operative, the military is not sometimes but always subject to it, and that that subjection governs the commander-in-chief of the military as much as it does any of his subordinates; that the legislature alone has the power to de-

termine when the conditions exist upon which the privilege of the writ of habeas corpus shall be suspended, and then to declare its suspension; that there has been no exercise of that power, nor any attempt to delegate it to the governor; that his functions with respect to laws is to execute them —not to suspend them, not to repeal them, not to construe them, not to enact them, and whenever he invades the province of the legislature, or of the judiciary, he should be made to know that such usurpation will not be tolerated.

The original opinion In re Moyer was rendered on the 6th day of June, 1904. It appears in 35 Colo. under the date of September, 1905. The dissenting opinion follows the main opinion, and to its careful consideration we invite the attention of this court. It need not be said that it expresses, much better than we can do, our views, as applied to the facts presented in that case touching the imprisonment in part, which is here complained of in full. The chief justice, not being content with his original opinion, long after the case was decided, and, as it appears, after a petition for rehearing was voluntarily withdrawn, without informing either the bar or the public whether that petition for rehearing was so withdrawn before or after the time when Mr. Moyer was discharged, proceeded to further justify the main opinion by a discussion of the case of Barcelon vs. Baker, No. 2802. in the highest tribunal of the Philippine Islands, a brief review of which had been found in Case and Comment for December, 1905. We happen to know that this case was attempted to be brought before the Supreme Court of the United States. Briefs were filed, and eminent counsel from the city of New York appeared before the court for the purpose of making an argument, and, if we are not misinformed, did make an oral argument before this tribunal. On the very day that that oral argument was made, the clerk of the court was advised that Barcelon had been set at liberty, and this court, by reason of that fact, never passed upon the findings of the court below. We call attention to this matter, not because we are complaining of the decision in the Barcelon case as rendered by the Philippine court, but because it shows that there is no remedy by a writ of error to a Supreme Court of a state in a habeas corpus case if the party holding the custody of the pe-

titioner sees fit at any time to discharge him prior to the rendition of the final decision. But what is this Barcelon case, and what relation does it sustain to, and how does it support, the action of the Supreme Court of the state of Colorado In re Moyer? Let us see.

Section 5 of the act of congress, known as the Philippine bill, declared that the privileges of the writ of habeas corpus might be suspended in cases of rebellion, insurrection or invasion in the Philippine Islands when the public safety might require it, the suspension to be by the president, or by the governor general, with the approval of the Philippine commission. By virtue of that act of congress, the precise authorities to whom the power was granted of suspending the privilege of the writ had formally suspended it as to Feliz Barcelon. He sought to be released by habeas corpus, by charging that there did not exist in the province named a state of rebellion, insurrection or invasion, and that the courts provided by law had at all times in the petition mentioned been in the full and complete exercise of their functions without interruption of any nature or kind.

If, in the case at bar, the legislature of the state of Colorado had suspended the privilege of the writ of habeas corpus upon the ground that the public safety required it, there would be no contention upon our part that the question could be reviewed as to whether or not a state of insurrection or rebellion existed, any more than there is any contention now upon it, except in so far as it affects the question of damages. We might question the Barcelon case, as it was questioned by the eminent New York counsel referred to, if it was necessary to a decision of this cause. But, with all due respect to the Supreme Court of the state of Colorado and to the counsel who argued the cause there, as well as the counsel who argue it here, we beg to say that, in our opinion, both the argument and the opinion fall to the ground, for the reason that the governor did not have the power to suspend the writ of habeas corpus or the privilege thereof; that the legislature had not attempted to suspend either the writ or the privilege thereof; that hence any arrest or detention of the prisoner could be questioned under the writ of habeas corpus, and if it were shown that there was any tribunal

competent to pass upon the guilt or innocence of the defendant within the jurisdiction where he was arrested, he must be brought before that tribunal. In other words, the governor could justify in two ways: First, by showing the suspension of the writ. Obviously that was the thing that he could not do, if what we have said with respect to the power of the legislature upon that subject is true; and, second, by showing that he was engaged in the restoration of the civil power which was incompetent at the moment that the writ of habeas corpus issued, or at any time thereafter before the return. Obviously that he could not do. *And so his counsel were driven to assert that the mere declaration upon the part of the governor that a state of insurrection existed, carried with it, as a necessary consequence, the liberty of every individual in the infected district as dependent upon his will.*

But it will not be necessary to pursue this matter further, for Justice Gabbert says himself that he only cites the Philippine case on account of its analogy, for in the closing paragraph of the supplemental opinion he says:

"The question is not involved or touched upon in the Philippine case."

The conclusion there announced, he asserts, was

"That with the privilege of the writ of habeas corpus suspended, the legality of the arrest and imprisonment of one taken into custody by the lawfully constituted authorities can not be inquired into."

How does it logically follow from the fact that with the privilege of the writ of habeas corpus lawfully suspended, an imprisonment cannot be inquired into; that without the privilege of the writ of habeas corpus being suspended an imprisonment cannot be lawfully inquired into? We leave the opinion to be justified, if it can, by the opinion of this court.

We have concluded our analysis, such as it is, of every position which has at any time been taken at any stage of the proceedings involving the imprisonment of Mr. Moyer. We are glad at last that this case is to be discussed before and submitted to a court so far removed from the state of Colorado and

the baleful influences which have permeated that state for several years last past. We are not content with our presentation of our side of this cause. We are sorry that we have not the brain and the tongue of a Webster or a Wirt with which to impress upon this court in oratory that burns the woes and the wrongs of which we complain. When we read such cases, however, as Marbury vs. Madison, where the only monied value which was mentioned was ten cents; when we read such cases as Ex Parte Milligan, where the life and the liberty of a very humble citizen was concerned; when we peruse the stalwart march of Chief Justice Taney's mind as he illumined the Merryman case; when we reflect that in the Dred Scott case nothing but the liberty of an African slave was involved, and then when we realize that this great court has wrestled with the questions presented without regard to the character or the standing of those who are involved, we come here with our fund of courage renewed, battered and shattered though it may have been by the action of other courts elsewhere upon propositions which to us have seemed so plain as not to require even argument. With our minds directed with such acumen as they possess to every contention which has been presented by the astute counsel upon the other side, it has really seemed to us as though this case would argue itself, and it may well be that we have not helped its inherent strength by anything which we have said or which we may in oral argument hereafter say. But one thing is certain, that if the doctrine of the decision of the Supreme Court of the state of Colorado is adopted, then there is in this country reposed in the governors of the various states an arbitrary power before which free men may well tremble. There are justices of this court who will remember how the great chief justice who rendered the opinion in the Dred Scott case was denounced from one end of the North to the other. There are those who are aware that if any such power was supposed to have existed as is now claimed, and as has been maintained in Idaho and in Colorado, that Chief Justice Taney might, by reason of the public clamor against him, well have lost his liberty if not his life.

It is a poor labor leader who is before this court to-day, asking for the enforcement of the guaranties contained in the

fourteenth amendment to the Constitution. He represents a body of men who have come in conflict with organized capital, with a result that is well known as a matter of public history throughout the entire civilized world as well as the United States. He has been bruised and beaten in body. He has suffered imprisonment and well nigh death for the cause which he represents, a cause as old as civilization, more intense at some times, less intense at others, but always in the field, always the inevitable conflict between capital and labor. If a way has been found by which he may be imprisoned without complaint under oath, without warrant of commitment, without hearing, without witnesses, without trial before a jury, then the day is not far distant when, if he and his kind ever attain the places and the power now held by others in the United States by virtue of the majority of the votes which he and his kind possess, and which they do not now know how to use in unison, but which it is believed they are fast learning, then the same sort of power may be exercised in the same way to imprison any person in all this land. The encroachments of arbitrary power are always insidious. They commence with the weak and the humble. Arbitrary power fattens upon that on which it feeds, growing more arrogant day by day, and if arbitrary power can be exercised for a space of seventy-eight days over a Moyer now, it can be exercised for any number of days over a justice of this bench or any other person in place or power in the days which are yet to come. The fangs of this dragon are revealed in this proceeding. They can be extracted by the opinion of this court. They will not be unless the law warrants it. If the law is as we believe it is they will be extracted by the opinion which will be rendered herein, and every citizen in this land, upon the rendition of the opinion, as he goes to his bed at night, will exclaim, this is indeed, in the language of the Massachusetts Bill of Rights, "a government of laws and not of men." This is indeed the wisest, the greatest, the most beneficent and the strongest government which the world has ever seen. It puts the pauper upon an equality with the millionaire. It puts the humble in a place of safety which can not be reached by the proud. It clothes the weak with a strength which the strong cannot overcome. It promotes fraternity and advises all

mankind that all men everywhere and at all times are brothers, sons of the same great Father, and each entitled to equal consideration at the hands of every one else.

Respectfully submitted,

EDMUND F. RICHARDSON,
HORACE N. HAWKINS,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

October Term, 1908.

No. 55

Office Supreme Court, U. S.
FILED
NOV 9
JAMES H. McKENNEY

CHARLES H. MOYER, PLAINTIFF IN ERROR,

vs.

JAMES H. PEABODY, SHERMAN M. BELL AND BULKELEY WELLS, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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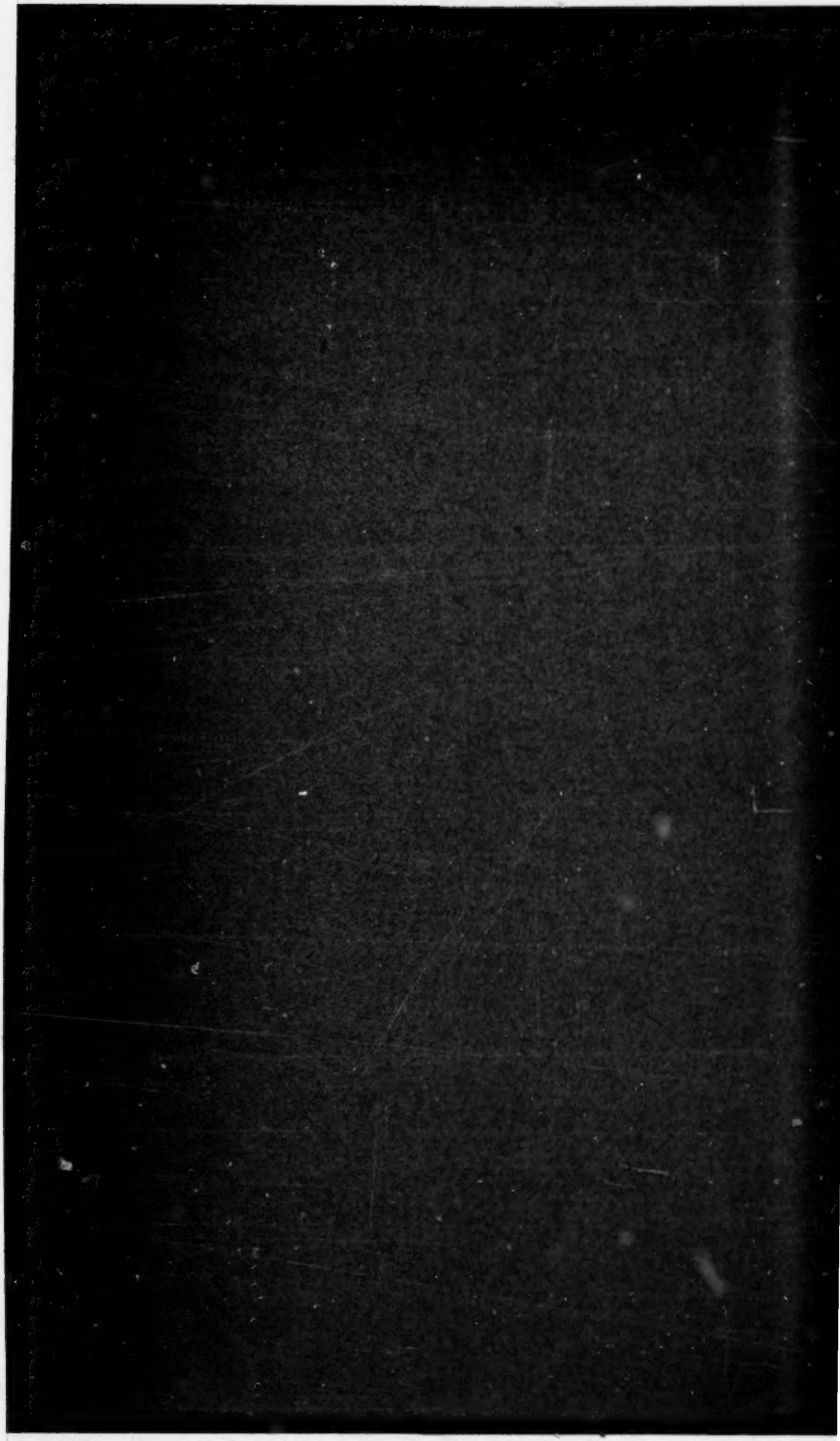

In the Supreme Court of the United States.

No. 55

OCTOBER TERM, 1908.

CHARLES H. MOYER, PLAINTIFF IN ERROR,

vs.

JAMES H. PEABODY, SHERMAN M. BELL AND BULKELEY WELLS, DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

This case is brought directly to this court by writ of error to review a judgment of the Circuit Court for the district of Colorado, sustaining defendants' demurrer to an amended complaint and dismissing the action. There are two grounds upon which to found the present writ of error:

First. The jurisdiction of the Circuit Court was put in issue by the demurrer and the question of jurisdiction has been certified to this court from the court below.

Second. The case involves the claim on the part of plaintiff that he has been deprived of certain rights guaranteed him by the fourteenth amendment to the federal Constitution, and

hence, that the case involves the construction or application of the Constitution of the United States.

On March 11, 1905, plaintiff in error filed his complaint in the Circuit Court for the district of Colorado. Process issued. Defendants in error appeared, filing demurrers to the complaint. The original complaint and the demurrers thereto require no further mention, because, on May 10, 1905, plaintiff in error obtained leave to file and did file an amended complaint. By the amended complaint it is in substance alleged:

First. That plaintiff is a citizen of the United States and a citizen and resident of Colorado; that defendants are citizens of the United States and citizens and residents of Colorado; but that the action is brought under the Constitution of the United States and under section 1979 of the Revised Statutes of the United States, by reason of the fact that under color of the Constitution and laws of Colorado, the defendants subjected plaintiff to the deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

Second. That at the general election held in Colorado, November 4, 1902, defendant Peabody was elected governor, and qualified January 13, 1903, for the term of two years; that thereafter, as governor, he appointed the defendant Bell as adjutant general of the national guard of the state, and the defendant Wells, as captain of a company thereof; that on or about March 23, 1904, defendant Peabody, as commander-in-chief of the state militia, and defendant Bell, as adjutant general thereof, caused a number of the national guard of Colorado to assemble at Telluride, in San Miguel county, in said state, and that said guard while so assembled was under the direction, order and control of Peabody, as commander-in-chief, Bell, as adjutant general, and Wells, as captain.

Third. That on or about March 30, 1904, defendants, acting as officers of the national guard, caused a squad of men under their control to arrest and imprison plaintiff in the city jail of Telluride, where he was confined and forcibly kept against his will from March 30, 1904, to June 15, 1904, defendants restraining him with force and arms of his liberty and subjecting him to hardships, privations, etc.

That, as plaintiff is informed and believes, the defendants claimed the right to arrest and detain him by virtue of their being officers of the state of Colorado and under the laws of Colorado, to wit, section 2, article 4, of the Constitution of Colorado, which is as follows:

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws shall be faithfully executed."

And section 5, of article 4, of said Constitution, which is as follows:

"The governor shall be commander-in-chief of the military forces of the state except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute laws, suppress insurrection and repel invasion."

That defendants claimed other statutes of Colorado gave them also the right to arrest, imprison and detain plaintiff, as described in the complaint, and under color of such laws did arrest, imprison and detain this plaintiff, as set forth; that plaintiff is unable to set out said statutes or to find them in the statute books or laws of Colorado; that the same were never pointed out to him by the defendants; but that defendants claimed that the laws of Colorado empowered them to act toward him as set forth; and, as aforesaid, under color of laws of Colorado, defendants deprived him of his liberty.

Fourth. That after his arrest, plaintiff applied to the Supreme Court of the state for a writ of habeas corpus, asserting in his application that he was deprived of his liberty, contrary to the laws of Colorado and the laws of the United States; that said court allow the writ to issue; that in their return to the writ, respondents Peabody, Bell and Wells did not claim that the courts of the state or of any part of the state were overthrown and that a trial could not be had to determine any charge of crime made against plaintiff; that Bell, in his return to the writ and in justification of the arrest and detention of plaintiff, said, in substance and effect, that he was adjutant general of the national guard of Colorado; that the governor of

the state had given him orders to arrest and detain said Moyer and not to release him until further orders from the governor; and further stated that Wells was at the time a subordinate military officer under the direction of Bell and acting pursuant to orders of Bell as adjutant general; that also, in said return made by Bell to said writ of habeas corpus, he stated:

"The undersigned further gives the court to be informed and to be advised that the said governor of the state of Colorado, in the exercise and discharge of his constitutional duties and powers in the premises, has issued orders and instructions to the undersigned in his official capacity, not to surrender or release the said military custody or charge of the said Moyer."

That said Peabody certified to and endorsed the correctness of this statement in his return to the writ of habeas corpus, and also stated that he (Peabody) was acting in his official capacity under the laws of Colorado relating to the arrest, detention and imprisonment of said Moyer.

That in further proceedings relating to the said application for discharge on habeas corpus, the Supreme Court of Colorado refused to admit Moyer to bail and finally rendered judgment in the case, adjudging that the governor and other respondents might, as officers of Colorado, under the authority vested in them under the Constitution and sections above set forth in the complaint, and the statutes of the state, hold and detain the said Moyer until in their judgment they saw fit to release him, thus by said decision establishing it to be a law and regulation in Colorado that the plaintiff or any citizen, may, at the will of the governor and officers of the militia be deprived of life, liberty or property without due process of law, and that they may deny any person within the state the equal protection of the laws; and that by the acts and decisions of the Supreme Court of Colorado, the plaintiff, or any other person similarly situated, cannot obtain in the courts of Colorado any redress for the wrongs so inflicted, which is contrary to and annuls the provisions of the Constitution and laws of the United States relative to personal rights.

Fifth. That notwithstanding the claim of the defendants to be acting under the laws of Colorado, and the decision of the Supreme Court, his arrest and imprisonment by them was without probable cause, and without legal process or color thereof, and not in due course of law; that his arrest and imprisonment, notwithstanding the action of the defendants under guise and color of the laws of Colorado and the decision of its Supreme Court, was contrary to the Constitution and laws of the United States, and that the course of conduct of the defendants was in wanton and reckless disregard of plaintiff's rights and of the rights and privileges and immunities guaranteed to him by the Constitution and laws of the United States.

Sixth. That prior to and up to the time of arrest, and during all of the time mentioned in the complaint, plaintiff had conducted himself as a law-abiding citizen of the United States and of Colorado; that during all of the time mentioned in the complaint, any person having committed a crime, or charged with the commission of a crime, the Constitution and laws of Colorado require that he should be informed of the charge in writing, under oath or affirmation, should have the right to appear in court and defend in person or by counsel, to demand the nature and cause of the accusation, to meet witnesses against him face to face, to have compulsory process to compel attendance of witnesses and to have a speedy and public trial by an impartial jury in the district in which the offense was alleged to have been committed, and that pending trial, the person charged with the crime, except for capital offenses, should be bailable upon furnishing sufficient sureties; that to give any person alleged to have violated any law, or believed to have violated any law, the privileges and immunities of citizens of the United States, due process of law and the equal protection of the laws, they must be proceeded against in accordance with the aforesaid requirements and provisions of the laws of Colorado. That at no time was any complaint, under oath or affirmation, lodged or filed in any court of competent jurisdiction against the plaintiff, and during all of the time he was prevented from having access to the courts of the state, from the privilege of demanding in any court of competent jurisdiction the nature of

the cause of accusation, from meeting witnesses, if any, against him, face to face, from having a speedy and public trial by an impartial jury of the county and district in which any offense was alleged to have been committeed by him.

That during all of the time of the arrest, detention and imprisonment, the courts of the state were open and in the free and undisturbed administration of justice, except in so far as prevented by the defendants from administering judicially the law of the state.

That plaintiff was at no time a member of the National Guard of Colorado, or subject to its rules and regulations; that during most of the time of his imprisonment he was kept in the city jail of Telluride under armed guard; that the jail was damp and unwholesome, by reason whereof he contracted an illness which greatly impaired his health and from which he still suffers; that by reason of said false arrest and imprisonment he suffered humiliation, mental anguish and impairment of health, to his damage in the sum of one hundred thousand dollars; that the wrongful acts committed by defendants deprived plaintiff of the privileges and immunities of citizens of the United States, of his liberty without due process of law, and denied him the equal protection of the laws guaranteed by the Constitution and laws of the United States.

Eighth. That none of the defendants have been convicted in any criminal prosecution for any of the wrongful acts charged in the complaint.

Upon these allegations plaintiff prays judgment for one hundred thousand dollars and costs; for a finding that the defendants were guilty of malice in the commission of the acts complained of, and for body execution against the defendants in default of payment of any judgment awarded in the action. (Transcript of Record, pages 8-13, folios 15-25.)

A motion to dismiss the action having been argued and overruled, the defendants filed their joint and several demurrer to the amended complaint. This demurrer specifies the following grounds:

1. That the Circuit Court has no jurisdiction of the action or the subject-matter thereof.

2. That the Circuit Court is without jurisdiction of the subject of the action, in that section 1979, United States Revised Statutes, does not authorize or empower Circuit Courts of the United States to take cognizance of or to hear or determine controversies, suits or actions based upon the alleged facts set forth in the complaint.

3. That the amended complaint fails to state facts sufficient to constitute a cause of action, in that it affirmatively appears from the allegations thereof that the matters in controversy are *res adjudicata* by reason of the adjudication of the Supreme Court of Colorado in the habeas corpus proceeding mentioned in the complaint, in which the issue as to the lawfulness of the arrest and detention—the same being the identical arrest and detention complained of in the amended complaint—was heard and determined and finally adjudicated in the Supreme Court of Colorado adversely to the plaintiff.

4. That the amended complaint does not state facts sufficient to constitute a cause of action against the defendants or either of them, independently of the claim of *res adjudicata*.

5. That the amended complaint is ambiguous and uncertain in several particulars specified. (Transcript of Record, pages 14-16, folios 27-32.)

In support of the third ground of demurrer, the defendants craved oyer of the record in and opinion by the Supreme Court of Colorado in the habeas corpus suit, and filed with the demurrer a duly certified copy thereof for the information of the court.

Subsequently, by agreement of counsel, the transcript of the record of the Supreme Court of Colorado in the habeas corpus proceeding so filed was taken and considered to be a part of the amended complaint. (Transcript of Record, page 60, folio 115.)

The transcript of the record in the Supreme Court of Colorado in the habeas corpus proceeding contains the petition of Moyer, plaintiff in error here, for a writ of habeas corpus filed in the Supreme Court of Colorado April 15, 1904.

In this petition it is alleged that the petitioner is a citizen of the United States and of Colorado, and a resident of Denver; that about March 24, 1904, he was present in the city of Ouray,

Ouray county, Colorado, transacting business connected with his office as president of a labor organization known as the Western Federation of Miners; that about that date an organization known as the Citizens' Alliance, of the city of Telluride, San Miguel county, Colorado, confederated and conspired that one of their number should swear out a warrant before a justice of the peace in San Miguel county, charging petitioner with having violated an act of the legislature of Colorado, entitled, "An Act to Prevent the Desecration of the Flag of the United States, etc."; that thereupon a warrant issued, under which the sheriff of San Miguel county arrested petitioner, took him from the city of Ouray and imprisoned him in the common jail of Telluride; that on March 28, petitioner, having waived preliminary hearing, was admitted to bail by a justice of the peace, to appear at the next term of the District Court in San Miguel county, Colorado, on May 10, 1904; that on March 23, 1904, Peabody, as governor of Colorado, issued a proclamation and executive order, the proclamation reciting the existence in San Miguel county of a class of individuals acting in conjunction with persons outside of the county, fully armed and acting together; that open and public threats had been made to resist the laws of the state and do violence to citizens and property in San Miguel county; that various crimes had already been committed under direction of these vicious and lawless persons; that further violations are threatened and will be resorted to; that the sheriff of San Miguel county had stated to the executive that the forces named, within and without the county, were about to join within the county to destroy property and inflict personal injuries upon citizens of the county; that by reason of this lawlessness, these disturbances and threatened acts of violence the civil authorities were unable to cope with the situation and that therefore the county of San Miguel is proclaimed to be in a state of insurrection and rebellion.

The executive order recites the conditions in San Miguel county which have been made to appear to the executive by the mayor of Telluride, five of the aldermen, the city attorney, the chairman of the board of county commissioners, the sheriff, and numerous other officials and citizens of Telluride and San

Miguel county; also, that these conditions require immediate action, and that the sheriff has notified the executive of the inability of the former to preserve and maintain order and protect lives and property; the adjutant general of the state is directed to assemble the necessary troops, report forthwith to the sheriff of San Miguel county and use such means as he may deem right and proper, acting in conjunction with or independently of the civil authorities, to restore peace and good order, and enforce obedience to the Constitution and laws of the state.

The petition then alleges that shortly after the executive order and prior to March 28, 1904, pursuant to said proclamation and order, the adjutant general proceeded to Telluride with about three hundred men of the national guard of Colorado, and proceeded to occupy the city of Telluride, San Miguel county, Colorado, and on March 29, 1904, Bell and Wells arrested and took into custody the body of petitioner and have retained him in custody and in prison since that time; that the arrest and imprisonment was without due process of law, none such having been issued, and was an arbitrary and illegal interference with the liberty of petitioner; that the alleged cause of the arrest, detention and imprisonment was military necessity, but the real ground was the unlawful combination and conspiracy of the Citizens' Alliance of Telluride.

That on March 29, 1904, Moyer petitioned the judge of the state District Court, sitting at chambers at Grand Junction, Mesa county, Colorado, for a writ of habeas corpus.

This last named petition is set forth in full, as is also the order of the judge of the state District Court, for the issuance of a writ of habeas corpus returnable April 11, 1904, at Ouray.

It is then alleged that the writ of habeas corpus issued out of the state District Court in conformity with the order, and was duly served upon Bell, the adjutant general, and Wells, his subordinate, at the city of Telluride, San Miguel county.

The petition then sets out the order of the state District Court, made April 11, 1904, the return day of the writ, from which it appears that Bell and Wells ignored the writ and failed to produce the body of the petitioner or make any re-

turn, "which can be considered by the court or judge thereof." This order directs an attachment to issue for the arrest and detention of Bell and Wells, without bail, until they shall obey the writ of habeas corpus.

Then follows the warrant of commitment, the attachment commanding the sheriff of Ouray county to seize and commit Bell and Wells in accordance with the order of the state District Court. This warrant being placed in the hands of the sheriff of Ouray county for service, the latter proceeded to San Miguel county for the purpose of executing the same; that Bell and Wells resisted the sheriff of Ouray county, and that the latter, with the assistance of the sheriff of San Miguel county, was unable to arrest Bell and Wells because of the aid and assistance received by the latter from the national guard; that Bell and Wells threatened death to any one interfering or attempting to interfere with them, and that with the aid of the national guard they would be able to successfully resist any posse that could be summoned; that in the proceeding before the judge of the state District Court, Moyer was duly adjudged to be entitled to his liberty, but that Bell and Wells did wilfully and maliciously insult and disobey the judge of the court and his order, and that the said District Court and its judge are without power to make effective their decrees, judgments and orders; that it would be useless for the sheriff of Ouray county, under existing circumstances, to call upon the governor of the state for aid.

It is next alleged that the arrest and detention of the petitioner is illegal and an unwarranted interference with his liberty; that he has violated no law; no indictment, information or complaint has been made or filed against him upon any criminal charge, except that of the alleged desecration of the flag, which has no foundation in fact, but is a mere device to create sentiment against the petitioner; that during his arrest he has been abused and humiliated; that the general assembly of Colorado had never at any time passed any act suspending the writ of habeas corpus or the privileges thereof, nor authorized the governor so to do, nor has the governor, with respect to San Miguel county, ever directly or openly made any proclamation

tending to suspend the writ or the privileges thereof; that the governor has no power to suspend the writ, or order any disobedience thereof, and that the acts of Bell and Wells are in open and flagrant violation of the Constitution and statutes of Colorado; that there has not at any time been any rebellion or invasion in San Miguel county, nor has public safety demanded the suspension of the writ of habeas corpus; that the District Court and the County Court of said county and the Justice Courts thereof have, during regular terms, been in session according to law, and regularly trying and disposing of cases upon their dockets, and that with the exception of the disobedience of Bell and Wells to the writ of habeas corpus and the warrant of commitment mentioned in the petition, all judgments and orders of the courts have been respected and obeyed; that no insurrection or rebellion exists in the county; that the county is in a state of peace; that the only violations of law are due to the combination of the Citizens' Alliance aided and abetted by Peabody and Bell; that the district attorney for the county has always been ready to file criminal complaints in proper cases.

The petition then sets out, *in haec verba,* a document issued by Bell, in the nature of a military order and military instructions. The contents of this document are not material, and will not be stated.

The petition then continues: That his arrest and imprisonment are violative of his rights guaranteed both by the federal and the state Constitutions prohibiting the abridgment of privileges and immunities and the deprivation of life, liberty or property without process, and the denial of the equal protection of the laws; that the acts of the governor and military commander are also violative of the fourth, fifth and sixth amendments to the federal Constitution; that Bell and Wells refused to file any criminal charge against petitioner, or inform him of any charge made against him, and maliciously held him in arrest without justification.

The allegations as to the defiance of the state District Court of Ouray county are repeated, as well as the allegations concerning the uselessness of attempting to carry the orders of the last

named court into effect. (Transcript of Record, pages 17-32, folios 33-60.)

The transcript of the record of the Supreme Court of Colorado shows that upon filing the foregoing petition, the writ of habeas corpus issued returnable April 21, 1904. Upon the return day of the writ the respondents Bell and Wells filed in the Supreme Court of Colorado a motion challenging the jurisdiction of that court and asking that the writ be quashed. Upon the same day they also filed their return to the writ. The return to the writ also contains a challenge to the jurisdiction of the court, and then states that on and prior to March 23, 1904, a state of insurrection and rebellion against the government, Constitution and laws of Colorado existed and still exists in San Miguel county, as evidenced by the proclamation and executive order of the executive of the state, the same being the proclamation and executive order set forth in the petition in the proceedings; that the proclamation and order are and have at all times since made, been in full force and operation in San Miguel county, which county has been and is treated and held to be in a state of rebellion and insurrection, which have not yet been effectually suppressed; that pursuant to the proclamation and executive order, the respondent Bell promptly proceeded to San Miguel county with the necessary force of the National Guard to suppress the insurrection and rebellion and restore public peace and tranquillity in the county; that at all times since, the National Guard, under the command of Bell, have been actively engaged throughout the county in the performance of this duty in restoring peace and good order and acting independently of the civil authorities of the county—the civil authorities being wholly powerless to render any aid in the premises; that the adjutant general, in pursuance of his duties and after his arrival at San Miguel county, had good reason to believe and did and does in good faith believe, and upon due inquiry became personally and officially satisfied and convinced that the petitioner Moyer had been, and if discharged from arrest, would continue to be, an active participant in continuing and keeping alive the condition of

insurrection and rebellion; that said Moyer was and is a leader of bands of lawless men engaged in the acts of insurrection and crimes mentioned in the proclamation of the governor, and that in order to suppress said rebellion and insurrection, it was and is absolutely necessary to arrest and detain, and for some time to come restrain the body of the said Moyer as an absolutely necessary step in suppressing the insurrection.

That animated solely by the desire to properly discharge his duties and authority in good faith, and being convinced that such action was indispensable for the suppression of the insurrection, respondent Bell, by virtue of his power and authority and in the discharge of his duties, caused the arrest and detention of the petitioner in San Miguel county, on March 29, 1904, and still detains petitioner for the reasons indicated and by virtue of the power, authority and duties imposed upon him; but that it is his purpose and intention in his official capacity to release and discharge Moyer from military arrest as soon as can be safely done, with reference to the existing state of insurrection and rebellion, and then to deliver him to the civil authorities of the county to be dealt with in the ordinary course of justice after the suppression of the insurrection.

Respondent further represents that the exigencies of the military situation in San Miguel county in suppressing the insurrection imperatively require the detention of Moyer to prevent him from lending aid, comfort, direction, instructions and commands to the lawless persons mentioned, in the further prosecution of the acts constituting a state of rebellion and insurrection, and that the ends of public justice and public tranquillity and the suppression of the insurrection require that the further detention of Moyer be not interfered with by writ of habeas corpus or other judicial process, and that the uninterrupted exercise of military force in San Miguel county, unimpeded for the time being, is indispensable for the accomplishment of the above purpose; that the governor of Colorado, in the discharge of his duties and powers, has ordered respondent, in his official capacity, not to surrender or re-

lease the military custody of Moyer during the continuance of the existing condition of affairs in San Miguel county, under a writ of habeas corpus, or otherwise, until he is further commanded by him.

The return concludes with the statement that the respondent Wells is a subordinate military officer, acting under direct command of Bell, upon orders issued by the latter, and prays that no further cognizance be taken in the matter of the writ of habeas corpus, except to quash the same. (Transcript of Record, pages 36-39, folios 69-76.)

Attached to and forming a part of the foregoing return is a certificate of the governor attesting the truth of the matters set forth in the return of Bell, stating that the arrest and detention of Moyer were in pursuance of constitutional authority and for the purposes set forth in the executive orders and proclamation referred to in the return; that the acts of Bell as adjutant general were done by express sanction of the governor as commander-in-chief; that in the judgment of the latter, upon full and careful review of all the facts and the true situation as it exists in San Miguel county, the continued detention of Moyer is a necessary and essential step in the restoration of public peace and order and the suppression of insurrection; that in order to fully advise the court of the gravity and seriousness of the situation a part of the mass of evidence submitted to the executive before the issuance of the proclamation and order, is set forth—the first being a petition of residents of San Miguel county setting forth conditions as recited in the executive order and proclamation, and praying the executive to immediately order the necessary number of the National Guard into the county and declare martial law.

This document is signed by the mayor, five aldermen, the city attorney, the chairman of the board of county commissioners, the sheriff by his deputy, the county attorney and twenty-two other citizens; and then follows a telegram from the sheriff confirming and ratifying the foregoing petition.

The certificate of the executive concludes with the statement that the condition of insurrection and rebellion recited in his proclamation is not yet fully suppressed, owing to the

number of lawless persons aiding and abetting the same, and that the ordinary civil authorities are utterly powerless to cope with the situation. (Transcript of Record, pages 39-42, folios 76-80.)

Following the certificate of the executive, and forming a part of the return in the habeas corpus proceeding, are the proclamation and executive order of the governor of March 23, 1904, already referred to. (Transcript of Record, pages 42-44, folios 82-84.)

To the return of the respondents Bell and Wells in the habeas corpus proceedings in the Supreme Court of Colorado, the petitioner Moyer made answer or reply, in which it is alleged:

1. That the return upon its face is insufficient.

2. That it is insufficient as a justification for the arrest and detention of petitioner.

3. That upon the face of the return petitioner is entitled to his discharge.

4. That neither the governor nor the respondents, nor any or all of them, under the circumstances shown in the return, or otherwise appearing, are authorized to arrest, detain, hold or continue to detain petitioner.

5. That no power exists in the executive, nor in the respondents, to suspend the privilege of the writ of habeas corpus.

6. That under the return petitioner is entitled to the privilege of the writ and an order for his discharge.

7. That there was not on the 23d of March, 1904, nor at any time, a state of insurrection or rebellion, either against the government or the Constitution and laws of Colorado, in San Miguel county; that the county has at all times been in a state of peace; that shortly before March 23, 1904, the Citizens' Alliance of Telluride came into existence, composed of certain mine owners and operators, merchants, bankers, liquor dealers and gamblers of Telluride, for the purpose of controlling the miners of the county, in violation of law and in the supposed interests of the organizers, who shortly before that had organized themselves into a mob and deported about seventy men who had theretofore been miners working in the mines of the county;

that these miners announced their intention of returning peaceably to their homes in said city and county, and further announced that they would resist any further interference with their persons and would resist any attempts at their redeportation; that their mission in returning was one of peace and that they would use no force, except in defense of their persons from attack; that thereupon certain persons in the mob, whose names are signed to the petition to the governor, made the representations to the executive as therein set forth, which representations were part of the plan of action theretofore agreed upon by the Citizens' Alliance for the purpose of controlling the labor situation, and that all of said proceedings were a part of and done in pursuance of such conspiracy, as set forth in the petition for a writ of habeas corpus.

8. That as to what the respondent Bell may believe petitioner is not responsible; that petitioner, as a matter of fact, has never been and will not continue to be a participant in keeping alive any condition of insurrection or rebellion; that, on the contrary, he has been at all times a law-abiding citizen of Colorado, obeying the laws of the land, and has advised in his official capacity, as president of the Western Federation of Miners, that no act of lawlessness occur upon the part of its members, so that no reflection might be cast upon said organization; that whatever may be the executive judgment or belief, or that of the respondents Bell and Wells, the arrest and detention of petitioner is violative of the laws of the land, of the federal Constitution, and the Constitution of Colorado.

9. Denies that his detention is essential to the ends of justice; denies the existence of any insurrection and avers want of power in the governor or the respondents over the writ of habeas corpus or the suspension of the privilege thereof.

10. Denies the necessity for the uninterrupted exercise of military force in San Miguel county; avers that the military force is acting in violation of the Constitution and statutes of the state and asserting itself as superior to the civil authorities and as authorized to act in contravention to that power and that said power is subordinate to it; that it is violating the rights of petitioner under the federal Constitution and the Con-

stitution of Colorado, as set forth in the petition. (Transcript of Record, pages 45-48, folios 86-92.)

In this state of the record in the Supreme Court of Colorado the application of petitioner in the habeas corpus proceeding to be admitted to bail was denied; and, later, the Supreme Court of Colorado, upon final hearing, adjudged that the arrest and detention under the circumstances shown were lawful, dis charged the writ and remanded the prisoner to the custody of the military authorities.

As already stated, when the demurrer to the amended complaint in the present case came on for hearing in the Circuit Court, counsel agreed that the foregoing transcript of the record from the Supreme Court of Colorado should be taken and deemed to be a part of the amended complaint.

The demurrer to the amended complaint was argued in the Circuit Court on the 25th, 26th and 27th days of September, 1906, and was then taken under advisement by the court. (Transcript of Record, pages 60-61, folios 115-116.)

Afterwards, and on November 5, 1906, the Circuit Court sustained the demurrer to the amended complaint; the plaintiff elected to stand upon his amended complaint and declined to plead further, whereupon judgment of dismissal was entered. (Transcript of Record, page 62, folios 117-118.)

Moyer vs. Peabody et al., 148 Fed. Rep., 870.

To review this judgment of the Circuit Court, the case is now here.

THE ERRORS ASSIGNED.

These are four in number, all, however, relating to the sustaining of the demurrer to the amended complaint and the rendition of judgment dismissing the action.

ARGUMENT.

The record here contains the certificate of the judge who sat in the Circuit Court and disposed of the demurrer, stating that he sustained the demurrer solely upon the ground that the

Circuit Court of the United States was without jurisdiction to entertain the amended complaint, and that the same was dismissed and judgment entered against the plaintiff and in favor of the defendants solely by reason of the fact that in his opinion the Circuit Court of the United States was and is without jurisdiction to entertain, hear or determine the matters set out. (Transcript of Record, page 72, folio 138.)

Notwithstanding this certificate and the ruling of the Circuit Court that it was without jurisdiction, the whole case is here for review. This point is exactly covered by the case of Giles vs. Harris, 189 U. S., 475, 486, where Mr. Justice Holmes, delivering the opinion of this court, said:

"Although the certificate relates only to the jurisdiction of the court as a court of the United States, yet, as the ground of the bill is that the Constitution of Alabama is in contravention of the Constitution of the United States, the appeal opens the whole case under the act of 1891, chapter 517, sections 5, 26, Statute 827. The plaintiff had the right to appeal directly to this court. The certificate was unnecessary to found the jurisdiction of this court, and could not narrow it. As the case properly is here, we proceed to consider the substance of the complaint."

We shall, therefore, discuss the issues of law raised by the demurrer to the amended complaint, without confining ourselves to the question of jurisdiction; and if it shall be the judgment of this court that the lower court had jurisdiction, but that, nevertheless, plaintiff in error was not in any event entitled to recover upon the case made by his amended complaint, then the judgment under review must be affirmed.

Broadly stated, we shall urge:

First: That the court below is without jurisdiction;

Second: That the amended complaint is insufficient in law and does not state facts sufficient to constitute a cause of action nor to entitle plaintiff in error to any relief;

Third: That the judgment of the Supreme Court of Colorado in the habeas corpus case is *res adjudicata* upon the only issue tendered here, viz.: the issue as to the lawfulness of the arrest and detention of plaintiff in error, and that the adjudication in the habeas corpus proceeding constitutes a bar to the prosecution of this action.

THE JUDICIAL POWER OF THE UNITED STATES DOES NOT EXTEND TO THIS CONTROVERSY. THIS IS NOT A CASE ARISING UNDER THE FEDERAL CONSTITUTION NOR UNDER ANY LAW OF THE UNITED STATES.

Diversity of citizenship is not claimed. It is sought to found the jurisdiction of the Circuit Court upon section 1979 of the United States Revised Statutes, which provides:

"Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

It is manifest that this section does not attempt to confer jurisdiction. It merely seeks to give a right of action in certain cases. It is entirely clear that a right of action for false arrest or false imprisonment, which we shall later show is the precise nature of the case attempted to be made by plaintiff in error, exists independently of section 1979.

It is true that paragraph 16 of section 629, U. S. Revised Statutes, seems designed to supplement section 1979 and to confer jurisdiction upon United States Circuit Courts:

"Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state of any right, privilege or immunity, secured by the Constitution of the United States, or any right secured by any law providing for equal rights of citizens of the United States, or of persons within the jurisdiction of the United States."

We are not aware of any other statutory provision which can be claimed to have a bearing upon the question of the jurisdiction of the Circuit Court, except section 1 of the act of March 3, 1875, as amended by the acts of 1887 and 1888. It is there provided in part that:

"The Circuit Court of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arising under the Constitution and laws of the United States."

For the purpose of this part of our discussion, we shall assume, as was done in Giles vs. Harris, 189 U. S., 475, 485, and in Holt vs. Indiana Mfg. Co., 176 U. S., 68, 72, that section 1979 has not been repealed, and that jurisdiction to enforce its provisions has not been taken away by any later act.

We shall also assume that it is unnecessary to cite authority in support of the rule that federal courts, inferior to this court, possess no jurisdiction except such as has been expressly granted by act of congress; the rule that doubt as to jurisdiction of the subject-matter is to be resolved against the existence of jurisdiction; that such federal courts have no jurisdiction by intendment; and that the later enactments of congress were designed to contract rather than to expand their jurisdiction.

The judicial power of the United States springs from article III, section 2, of the Constitution, which provides, in part, as follows:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

No subsequent amendment to the Constitution enlarges the grant of judicial power.

The most favorable light in which the claim made by plaintiff in error for relief in this case can be viewed, is that he was by the acts of the defendants in error deprived of his right of personal liberty, guaranteed by the fourteenth amendment.

It is here pertinent to remark that the fourteenth amendment was not designed to, and did not, enlarge the judicial power of the federal government. That amendment increased the power of congress; it diminished the power of the states; it has given rise to many questions for litigation and adjudication

in the federal courts, and has thus added to the burdens and responsibilities of the federal judiciary; but it left the judicial power as it was before the amendment.

To correctly construe and apply section 1979 and paragraph 16 of section 629, we are to hold in mind those conditions which prompted, not only the enactment of the statutes themselves, but the adoption of the amendments to the Constitution which these statutes were designed to make effective.

There is no need to dwell upon the purpose of the 13th, 14th and 15th amendments to the Constitution. That purpose was stated by Mr. Justice Miller in the opinion in the Slaughter House Cases. We doubt if the statement there made can be improved.

Primarily, the design was to protect negroes as a class against hostile discrimination by the states. Resulting from this is, of course, the protection of all classes of persons against such discrimination. In short, the design of the fourteenth amendment (toward which our attention is here especially directed) was class protection against state invasion.

To more fully effectuate this purpose and in pursuance of the desire to fully protect the newly emancipated negro and to give him the whole benefit of the post bellum amendments, congress enacted certain statutes designed to give effect to the civil rights of the black race. Congress did more; it even sought to establish equality of social as well as political right. The statutory provisions under consideration were a part of that legislation, much of which has been held to be unconstitutional and all of which should be limited to the purpose for which it was designed.

United States vs. Cruikshank, 92 U. S., 542.

United States vs. Harris, 106 U. S., 629.

The constitutional rights, of which plaintiff in error claims he was deprived, are among those enumerated in the fourteenth amendment. To that amendment we must look to find authority for the legislation which, it is claimed, gives the right of action here and confers jurisdiction thereof upon the Circuit Court.

We have here to deal particularly with that part of section 1 of the amendment which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of the same amendment gives congress power to enforce by appropriate legislation the provisions thereof.

We must not overlook the essential difference between the 13th and 14th amendments in their province and scope and in the powers which they confer upon congress. This distinction is clearly pointed out in the opinion of Mr. Justice Bradley in the Civil Rights Cases, 109 U. S., 3, 20, 23, and is emphasized by Mr. Justice Brewer in Clyatt vs. United States, 197 U. S., 207.

Stated in general terms, the distinction between the two amendments is, that under the fourteenth amendment, congress has only the power to *counteract* and *render nugatory* all state laws and proceedings which have the effect to abridge any of the privileges and immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. That is to say—under the fourteenth amendment legislation by congress is *corrective* in its character. On the other hand, under the thirteenth amendment congress has power to legislate "so far as necessary or proper to eradicate all forms or incidents of slavery or involuntary servitude, and under *this* amendment legislation may be *direct and primary,* operating upon the *acts of individuals,* whether sanctioned by state legislation or not.

During the forty years which have intervened since the adoption of the fourteenth amendment, this court has been frequently called upon to assert the limitations of the amendment and of legislation thereunder. It is settled beyond dispute that the amendment did not take from the states the duty nor the responsibility of protecting private rights against assault by private individuals; that congress has no power to enact a law providing for the punishment of a private citizen for an invasion of the rights of his fellow citizen, both being residents of the same state.

In other words, the fourteenth amendment did not enlarge the rights of one citizen against another. The rights of one citizen against another—his right of personal liberty—his right to freedom from improper restraint (except through state action)—was in no way added to by that amendment. Such rights were not granted by the Constitution; nor were they derived from that instrument. They antedated the Constitution and the amendment. They are "inherent and inalienable." All that the fourteenth amendment did, or sought to do, was to add the protection of a federal guaranty against state action, depriving individuals or classes of individuals of the enjoyment of these pre-existing, fundamental rights.

The power of congress to enforce the prohibitions of the amendment does not include the power of direct and primary legislation.

Bearing in mind these principles, we proceed to consider the case made by the amended complaint.

The theory upon which that pleading proceeds is, that the defendants, though claiming to act under color of the Constitution and laws of Colorado, were, in fact, acting beyond all law and all color of law; that they were acting by virtue of office, but nevertheless the acts complained of were the malicious and tortious acts of individuals, depriving a fellow citizen of his right of personal liberty without probable cause and without process of law.

Action is not claimed to have been taken by the defendants under color of an unconstitutional statute; nor against a class of persons; nor against plaintiff as belonging to a class. Stripped of its verbiage and reduced to its primary elements, the amended complaint states neither more nor less than a case of false arrest and false imprisonment.

Upon its face, the amended complaint shows by affirmative allegation the sufficiency of the Colorado Constitution and the Colorado statutes in their provisions for the safeguarding of personal rights.

The real cause of complaint is that the defendants were trespassers; no more, no less. When the defendants acted beyond authority of law—beyond all color of law (assuming for

the purpose of argument that they did)—they acted and could have acted only as individuals and their action was not the action of the state. They are here sought to be held for their acts upon that theory, and none other. The most that can be claimed is, that they acted *by virtue of office,* and a sound distinction exists between acts done by virtue of office and acts done under *color of law.*

This distinction was recognized by Mr. Justice Field in the concurring opinion in Virginia vs. Rives, 100 U. S., 313, 334, where it is said:

"But the executive and judicial departments only construe and enforce the laws of the state; the inhibition, therefore, is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the state is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court: it cannot be imputed to the state so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights."

The same distinction is recognized and made the basis of the decision in the case of *Barney vs. City of New York,* 193 U. S., 430, 437.

That was the case of a bill to enjoin certain officials from proceeding with the rapid transit tunnel under Park avenue, New York. It was alleged that the officials, who were parties defendant to the bill, were proceeding in violation of law, and that the effect of such action would be to deprive the complainant of property without due process of law, in violation of the fourteenth amendment. This court, speaking through Mr. Chief Justice Fuller, said:

"The jurisdiction of the Circuit Court was invoked upon the ground that by the tunnel construction sought to be enjoined, complainant was deprived of his property without due process of law, in violation of the fourteenth amendment. But that amendment prohibits deprivation by a state, and here the bill alleged that what was done was without authority and illegal. * * *

"Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the fourteenth amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

A similar case is that of *St. L., I. M. & S. Ry. Co. vs. Davis*, 132 Fed. Rep., 629, 639, where, in the course of the opinion, it is said:

"If the contention of complainant that whenever a person acting as an officer of the state does any act in violation of the laws of the state, which if not prevented by the courts would result in the unlawful taking of property, brings the case within the jurisdiction of the national courts, regardless of a diversity of citizenship, be sustained, it would practically result in filling the dockets of those courts with cases of every conceivable nature."

See, also,

City of Dawson vs. Trust Co., 197 U. S., 178.

In passing, it is not amiss to remark that the case here, in which the original jurisdiction of the Circuit Court is sought to be sustained, presents a case very different from that which would be presented were the final judgment of the Supreme Court of Colorado in the habeas corpus proceeding here for review under section 709, U. S. Revised Statutes, or, that which would be presented had the state courts by final judgment in an action for damages founded upon the matters alleged in the amended complaint here, denied to plaintiff in error some right guaranteed him by the fourteenth amendment, and the supposed case were here for review under section 709.

In the cases supposed, state action might properly be claimed to be involved. In the case at bar, however, plaintiff in error proceeds upon the assumption that he will by action of the judicial department of the state of Colorado be deprived of the redress which he now seeks.

We shall now refer to certain decisions of this court which, in our opinion, bear directly upon the question of the jurisdiction of the Circuit Court, and sustain our contention that the federal judicial power does not extend to a case of this kind; that this is not a case arising under the Constitution; that there is no statute of the United States which covers the case; that if the statutes relied upon by plaintiff in error were to be given the effect which must be claimed for them, they would be invalid.

We first turn to the leading case of *United States vs. Cruikshank,* 92 U. S., 542, 553, 554, 555.

That case was founded upon an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement Act, 16 Statutes at Large, 140.

It was contended that the act, in so far as it attempted to create offenses and impose penalties, was in violation of the Constitution, and an infringement of the rights of the several states and the people. The opinion of this court was delivered by Mr. Chief Justice Waite.

The invalidity or ineffectiveness of the legislation, as applied to the facts set forth in the indictment in that case, was made clear in the opinion in the following language:

"The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to *falsely imprison* or murder citizens of the United States, being within the territorial jurisdiction of the state of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the states, when they entered into the Union under the Consti-

tution, was to protect all persons within their boundaries in the enjoyment of these 'inalienable rights with which they are endowed by their Creator.' Sovereignty for this purpose rests alone with the states. *It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself.*

"The fourteenth amendment prohibits a state from depriving any person of life, liberty or property, without due process of law; *but this adds nothing to the rights of one citizen as against another.* It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in Bank of Columbia vs. Okely, 4 Wheat., 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment."

* * * * * * *

"The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. *The only obligation resting on the United States is to see that the states do not deny the right.* This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

(The italics are ours.)

Later, came the case of United States vs. Harris, 106 U. S., 629, 637, 638, 639, 644, in which the opinion was delivered by Mr. Justice Woods. From this opinion we beg leave to quote at length:

"Section 5519, according to the theory of the prosecution and as appears by its terms, was framed to protect from inva-

sion by private persons the equal privileges and immunities under the laws of all persons and classes of persons. It requires no argument to show that such a law can not be founded on a clause of the Constitution, *whose sole object is to protect from denial or abridgment, by the United States or states,* on account of race, color or previous condition of servitude, the rights of citizens of the United States to vote."

* * * * * * *

"The purpose and effect of the two sections of the fourteenth amendment above quoted were clearly defined by Mr. Justice Bradley, in the case of United States vs. Cruikshank, 1 Woods, 308, as follows: 'It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, *not a guaranty against the commission of individual offenses;* and the power of congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the states. The enforcement of the guaranty does not require or authorize congress to perform the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform.' "

* * * * * * *

"So in Virginia vs. Rives, 100 id., 313, it was declared by this court, speaking by Mr. Justice Strong, that 'these provisions of the fourteenth amendment have reference to state action exclusively, and not to any action of private individuals.'

"These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the fourteenth amendment.

* * * * * * *

"Section 5519 of the Revised Statutes is not limited to take effect only in case the state shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the state may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the state.

* * * * * * *

"It was never supposed that the section under consideration conferred on congress the power to enact a law which

would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the state of which they were both residents, on all its citizens alike."

A part of the same legislation was also the subject of elaborate consideration by this court in the Civil Rights Cases, 109 U. S., 3, 10, 11, 13, 14, 15. Opinion by Mr. Justice Bradley.

"The first section of the fourteenth amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that:

"'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutem fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? *To enforce the prohibition.* To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to.

* * * * * * *

"And so, in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state

authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation can not properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication.

* * * * * * *

"An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? If it is supposable that the state may deprive persons of life, liberty and property without due process of law (and the amendment itself does suppose this), why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theaters? The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the Con-

stitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

In the case of Logan vs. United States, 144 U. S., 263, 293, Mr. Justice Gray, after reviewing the previous decisions of the court, said:

"The whole scope and effect of this series of decisions is that while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and *can not therefore be affirmatively enforced by congress against unlawful acts of individuals;* yet, that every right created by, arising under or dependent upon, the Constitution of the United States may be protected and enforced by congress by such means and in such manner as congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object."

In this connection the case of *Hodges vs. United States,* 203 U. S., 1, 14, 15, 16, merits earnest consideration.

In that case there was an indictment founded on U. S. Rev. Stat., sections 1977 and 5508, charging conspiracy to hinder certain persons of African descent from the enjoyment of their rights and privileges under the Constitution. The court held that the United States had no jurisdiction of the wrong charged in the indictment and directed a reversal of the case, with instruction to sustain the demurrer to the indictment. The holding of the court is to the effect that the wrong charged in the indictment was one which, under the Constitution was not within the jurisdiction of the national government. In the opinion delivered by Mr. Justice Brewer, it is said:

"That prior to the three *post bellum* amendments to the Constitution, the national government had no jurisdiction over a wrong like that charged in this indictment, is conceded; that the fourteenth and fifteenth amendments do not justify the

legislation, is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of."

Quotation is made from the Slaughter House Cases, 16 Wall., 36, as follows:

"And after referring to other cases this court added (page 77):

"'It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended upon the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the state—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder and laws impairing the obligation of contracts. But, with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens and of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government.'"

And the opinion then continues:

"Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the tenth amendment, which reads, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,' is not shorn of its vitality. True, the thirteenth amendment grants certain specified and additional power to congress, but any congressional legislation directed against individual action which was not warranted before the thirteenth amendment must find authority in it."

In *Carter vs. Greenhow*, 114 U. S., 317, section 1979 and the 16th clause of section 629 were under consideration, and were held not to apply, it being indicated that the remedy for the deprivation of constitutional right there asserted was by resort to the state courts in the first instance, and finally, if necessary, by review on writ of error from this court to the state courts.

Such, we submit, is the proper remedy in the case at bar. Plaintiff in error plainly misconceived his remedy when he sought to invoke the original jurisdiction of the Circuit Court.

New Orleans vs. Benjamin, 153 U. S., 411, 424.

We observe, in passing, that it may well be doubted, as was suggested in Giles vs. Harris, 189 U. S., 475, 485, whether section 1979 was intended to extend to the deprivation of rights under color of a state Constitution and whether the act was not purposely limited to "inferior sources of law." It is also to be doubted whether the section under consideration was intended to cover suits brought against the executive of a state, and whether it is not limited to acts done by minor officials acting under color of an unconstitutional law derived from an inferior source.

But, however these doubts may be resolved, the conclusion must be that the plaintiff has not stated a case within the terms nor the design of the statute; nor one within the judicial power of the federal government; unless it is to be held that every case of false arrest and false imprisonment made and imposed by virtue of office is a deprivation of rights under the fourteenth amendment, such as to entitle the aggrieved party to invoke the original jurisdiction of the Circuit Court of the United States in an action at law to recover pecuniary damages.

To sanction the claim that the Circuit Courts have jurisdiction of such cases, is to extend the original jurisdiction of those courts so as to include a class of cases involving controversies between citizens of the same state in which one individual is claimed to have deprived another of some right guaranteed by, but not arising under, the federal Constitution.

The statute has no such design. If it had its enactment would be beyond the power of congress and an unwarranted addition would be made to the rights and remedies of one citizen against another citizen of the same state.

Thus far we have not touched upon the broad contention that no court, state or federal, has jurisdiction of the matters

set out in the amended complaint. We shall save this matter for discussion in another branch of our argument.

THE AMENDED COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

THE RESERVED POWERS OF THE STATES—STATE SOVEREIGNTY.

There is no necessity to attempt enumeration of the reserved powers of the states. It is sufficient for present purposes to say that included within those powers reserved to the state is the police power—that broad, indefinable power by virtue of which the state may "impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order and prosperity."

This power is essential to the existence of the state—an incident of sovereignty. It includes the power of self-defense—the power to protect existence and maintain authority; and the states are not to be stripped of this most essential attribute of sovereignty—this right of self-preservation.

The inherent power of sovereignty to declare war and make peace has been surrendered by the several states to the federal government. But state sovereignty, in its proper sense, exists as a reality, as it has from the beginning of the government. The tenth amendment is not "shorn of its vitality." Centralization of power in the federal government has not proceeded so far as to cause us to forget that, within its sphere, the power and authority of the state are supreme. We repeat that among the powers never surrendered by the state—never intended to be surrendered—is the power of self-defense, a part of the police power—the power to suppress insurrection, to put down riot, to prevent the influence and operation within its borders of agencies more destructive of safety, good order and public welfare than the spread of the worst contagion that ever afflicted any people.

Without this power, the sovereignty of the state would indeed be lost; the state government would be impotent and useless in any emergency.

The effect of depriving the states of these rights would be, to use the language of Mr. Justice Miller, in the opinion in the Slaughter House cases, *supra*, "to fetter and degrade the state governments by subjecting them to the control of congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character," and to "radically change the whole theory of the relations of the state and federal governments to each other, and of both these governments to the people."

No such result has ever been intended.

Notwithstanding the theory upon which the amended complaint proceeds, we submit that upon the record here, taking the record of the Supreme Court of Colorado in the habeas corpus proceeding, to be a part of the amended complaint, it appears, beyond question, that the acts complained of were done by the defendants as officials, in pursuance of their duty to the state, and well within their lawful powers.

In *Luther vs. Borden*, 7 Howard, 1, 45, 46, Chief Justice Taney said:

"Unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. * * * It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition."

Says Hare, in his work on American Constitutional Law, volume II, page 969:

"But a state might as clearly use the military power to put down an armed insurrection too strong to be controlled by the civil authorities. This power was essential to every government and must be possessed by the states. Martial law might be declared under these circumstances and the officers engaged in the military service of the state might, under the authority which it gave, arrest every one whom they had

reasonable grounds to believe was a party to the insurrection. Without the right to do this, martial law and the military array of the state would be a mere parade."

In *Griffin vs. Wilcox,* 21 Ind., 370, 380, the Supreme Court of Indiana declared the like power to exist, and expressly characterized it as the war power of the governor of a state, saying:

"These two maxims (*'inter arma silent leges'* and *'salus populi suprema lex'*) and their application illustrate and define martial law, under absolute governments; and, for the purposes of the case at bar, we shall concede the right to exercise that law, as thus defined and applied, under our government, limited, as all its departments are, by a Constitution. It is the law of force applied to govern persons and places where the civil law is expelled; its officers rendered unable to execute it, by forcible resistance. The right thus temporarily and locally to exercise martial law, in case of necessity, is the war power of the governor of a state and of the president of the United States; * * * and this war power each executive usually exerts through his subordinate military officers."

The Supreme Court of Pennsylvania, in *Com. vs. Shortall,* 206 Pa. St., 165, 171, 172, also held that a state possesses the power of waging war for the purpose of suppressing insurrection, and that all of the power and authority of the state in that respect was lodged in the governor; that martial law, with all of its known and recognized incidents, followed in the wake of military operations, conducted under the sole supervision of the governor, as commander-in-chief.

See, also, In re Boyle, 6 Idaho, 609, to the same effect.

And Justice Story, in *Houston vs. Moore,* 5 Wheat., 1, 54, said:

"Why may not a state call forth its own militia in aid of the United States to * * * suppress insurrections or repel invasions? It would certainly seem fit that a state might so do where the insurrection or invasion is within its own territory and directed against its own existence or authority."

Sutherland's Notes on the United States Constitution (page 202), in discussing the general subject of military law, states:

"They (the states) possess, also, a concurrent power to aid the national government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection."

On page 458, *id.*, the text further reads:

"The organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause (article 1, section 10, clause 3, U. S. Constitution). This clause contemplates the use of the state's military power to put down an armed insurrection, too strong to be controlled by civil authority, and the state concerned must determine what degree of force the crisis demands."

And in Ordronaux's Constitutional Legislation, at page 332, it is said:

"But in suppressing an armed opposition they (the states) may resort to the rights and usages of war in the same manner as any established government, and the exercise of such authority cannot be questioned by the courts."

These authorities recognize, in the most unmistakable terms, the possession by each of the states of the inalienable right of protection and self-preservation from the acts of lawless, disorderly persons, who may be banded together for the purpose of opposing its civil or political authority, or the execution of its laws when the local civil authorities are inadequate to put them down, and it needs no elaboration of argument to support the axiom that without the existence of such power on the part of the state, it would instantly cease to possess every element of sovereignty. It would no longer be clothed with any of the attributes of government. Deny that power, and the state at once ceases to exist, except as a mere geographical expression.

Nor was the power of which we speak surrendered or abridged by the adoption of the fourteenth amendment.

Arndt vs. Griggs, 134 U. S., 316.
In re Rahrer, 140 U. S., 545.
Mugler vs. Kansas, 123 U. S., 623, 664.
Minneapolis Ry. Co. vs. Beckwith, 129 U. S., 26, 29.

The necessary powers of the state are not to be destroyed nor their efficient execise prevented.

U. P. Ry. Co. vs. Peniston, 18 Wall., 5.

These principles control here. The acts of the chief executive of Colorado, done in the preservation of order and the maintenance of peace—in the assertion of the supreme authority of the state, do not furnish the basis of a cause of action for the recovery of a money judgment. To permit recovery in such a case is not only to strike a fatal blow at the sovereignty of the state, but is also to paralyze the executive branch of the government, subordinate it to the whim or judgment of the judicial branch, and to put an end to the American doctrine of government by three co-ordinate branches.

THE QUESTIONS SOUGHT TO BE LITIGATED IN THIS CASE ARE PURELY POLITICAL—FEDERAL COURTS ARE NOT CLOTHED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES WITH ANY JURISDICTION OVER SUCH QUESTIONS.

The issues of fact tendered by the amended complaint are two in number:

First. Did a state of insurrection exist in the county of San Miguel?

Second. If a state of insurrection did exist, was the arrest and detention of the plaintiff necessary or proper as a measure in the suppression of that insurrection?

We contend that these are purely political questions, and that it is wholly beyond the power of the judiciary to investigate or to review the conclusion and action of the regularly constituted political authorities in the premises.

Authority to support our contention is not wanting.

In Black on the Constitution, page 64, it is said:

"The courts must arrogate no supervision or control over the executive department in the discharge of its proper duties. The judiciary does not possess and can not exercise any revisory power over executive duties."

And in section 55, page 83 of the same work, this language occurs:

"Chief Justice Marshall, at an early day, observed that 'questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.'"

In the same section (page 86), in stating what constitute executive or political powers within the meaning of this rule, the author says:

"Whether or not a state of war, insurrection or public hostility within the limits of the country * * * existed at a given date, and the nature and extent of the war, if any existed, is a question upon which the judicial tribunals must follow the political departments and accept their determination as conclusive."

We also quote from Brice on The American Constitution, volume 1, page 262, where the author sums up the result of the decisions, in the folowing language:

"Whenever it (the Supreme Court) finds any discretion given to the president, any executive duty imposed on him, it considers the manner in which he exercises his discretion and discharges the duty *to be beyond its province.*"

And on page 397 of the same work, the author says:

"Even where it may be thought that an act * * * of the executive is opposed to the spirit of the Constitution, still, if it falls within the range of the discretion which these authorities have received, it will not be questioned by the judges."

In *Phillips vs. Hatch*, 1 Dillon, 571, Dillon, circuit judge, said:

"Since the president, and not the courts, was empowered to decide when a state was in a condition of *insurrection* * * *, the president, and not the courts, should determine how long the condition of hostility continued."

"The condition of peace or war, public or civil, in a legal sense, must be determined by the political department of the government, and the courts are bound to that decision."

United States vs. 129 Packages, Federal Case No. 15941.

Whether war existed at the time when acts justified under military authority were done, is not a question for a jury, but is a question to be determined solely by the political power of the government, and of such determination the courts must take judicial cognizance. This, in effect, is held in Sutton vs. Tiller, 6 Cold., 593 (Tenn.)

We quote from *In re County Court, etc.*, 38 Court of Claims, 205, as follows:

"This court has uniformly held that what was or was not hostile territory during the Civil War could be determined only by the president or congress, and could not be inquired into or passed upon by the judiciary."

In Keeley vs. Sanders, 99 U. S., 441, 446, Mr. Justice Strong, speaking for this court, said:

"Whether the military authority had been established through Shelby county * * * is a political question, to be answered by the executive branch of the government, and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers."

To the same effect, see the holding of the Supreme Court of Colorado in the habeas corpus proceeding:

In re Moyer, 35 Colo., 159.

The rule, that the exercise of political powers by the executive or legislative branch of the government will not be questioned by the courts, applies as well to the executive and legislative branches of the state government as to those of the federal government. The principle is the same in each case.

The existence or non-existence of a state of insurrection being in its essence a political and not a judicial question, the rule applies with equal force whether the question has been

determined by the authorities of the state or by the authorities of the national government. The determination of the question is binding upon all courts, state and federal.

In *Hawkins vs. Governor*, 1 Ark., 570, 586, the Supreme Court quoted with approval the language of Chief Justice Marshall in Marbury vs. Madison, where that eminent judge said:

"that the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable *only* to his country *in his political character and to his own conscience.*"

And then pertinently observed:

"If this is true in regard to the president, does not the same reasoning apply with equal force to the executive of the state? If there exists no power to control the will of the president in the exercise of his discretion, is not the executive of the state equally exempt from all control, except in the manner pointed out by the Constitution? * * * Are not the powers and duties of the executive of the state equally political? * * * and is not his decision upon all legal constitutional questions equally final and conclusive, so far as regards the performance of his own duties? If one of these positions be true, it necessarily follows that the other can not be erroneous. Then the governor of a state is not amenable to the judiciary for the manner in which he performs * * * his legal or constitutional duties."

We therefore submit, with all confidence, that the Circuit Court was correct in holding that it was without jurisdiction in this case, and was without power to hear witnesses for the purpose of determining or permitting a jury to determine whether a condition of insurrection against the authorities of the state of Colorado existed in San Miguel county at the time of the arrest and detention of Moyer, or whether that arrest and detention was a necessary step in the suppression of the insurrection, if such existed.

The court below correctly held that the whole matter was confided, both by the federal Constitution and the Constitution

of the state, to the final decision of the chief executive of the state, which determination is and must be exempt from supervision, revision or control by any judicial tribunal, state or federal.

An example of the application of the doctrine of non-interference by the judiciary with political questions is found in the decision of this court in the case of *Louisiana vs. Texas*, 176 U. S., 1.

That was an original suit, instituted in this court by the state of Louisiana against the state of Texas, to obtain a decree annulling and removing an embargo laid by Texas against Louisiana, prohibiting all intercourse between the citizens of the two states, it being averred, among other things, that armed bodies of men were maintained by the state of Texas to enforce the embargo. The state of Texas asserted as justification for its action the existence of an epidemic of yellow fever in New Orleans. The bill, however, averred that the authorities of Texas intended to keep up the embargo indefinitely without occasion or necessity; that in fact no epidemic of infectious disease existed anywhere in Louisiana; that only a few sporadic cases had occurred, and by reasonable quarantine regulations normal intercourse between the states could be carried on without danger of introducing infectious disease into Texas.

Divers improper motives were assigned to exist on the part of the governor of Texas and the authorities of that state for the purpose of maliciously injuring the trade and commerce of Louisiana. More was averred, all tending to show, if true that the authorities of Texas were exercising power arbitrarily and without warrant in the enforcement of wholly unnecessary and uncalled for quarantine regulations.

The bill was dismissed. It was expressly held that the matters sought to be litigated were purely political in their nature. We quote from page 23 of the opinion:

"Jurisdiction over controversies of that sort (viz., controversies between states over which the Supreme Court is clothed with original jurisdiction) does not embrace the determination of political questions, and where no controversy exists between states it is not for this court to restrain the governor of a state

in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment."

We submit that if the enforcement of quarantine regulations by state authority involves the exercise of political power and is, for that reason, beyond review by the courts, much more must it be true that the exercise by the state of its police power in the restoration of public peace, order and safety by the suppression of insurrection within its boundaries is a purely political matter and wholly beyond judicial inquiry.

The interference under state executive authority either with persons or with property in the due course of enforcing quarantine regulations or suppressing insurrection does not constitute a deprivation of liberty or property without due process of law within the meaning of the Constitution.

Such, we submit, is the rule to be deduced from the case of Compagnie Francaise vs. State Board of Health of Louisiana, 186 U. S., 380.

That was a case on error from the Supreme Court of Louisiana. An action had been instituted by plaintiff in error to recover damages for an alleged illegal, unconstitutional and malicious exercise of power by the state board of health in the enforcement of the quarantine laws of the state, by which the plaintiff claimed to have suffered serious pecuniary damage.

The decision of the Supreme Court of Louisiana, dismissing the action, was affirmed—this court, in effect, holding that, wholly regardless of the unlimited and alleged arbitrary powers conferred by the statute, no provision of the federal Constitution could be successfully invoked for the maintenance of the suit.

To hold that the court below should entertain jurisdiction of the case at bar would be to hold that the Circuit Courts of the United States may review the exercise of purely political powers by the chief executive of a state. The disastrous effects of such a holding can not be estimated.

THE GOVERNOR OF COLORADO HAS POWER TO DETERMINE THE EXISTENCE OF A STATE OF INSURRECTION IN A GIVEN LOCALITY IN THE STATE AND AS AN INCIDENT THERETO, THE POWER TO DETERMINE WHAT PERSONS WITHIN THE INSURRECTIONARY DISTRICT ARE TO BE TREATED AS AIDERS OR ABETTORS OF SUCH INSURRECTION.

Under the Constitution of Colorado, as construed by the Supreme Court of that state, the chief executive of the state has the power to ascertain and determine whether there exists in any part of the state an insurrection against the authority of the state, and has likewise the power to use the state's military forces to suppress such insurrection, and in the course of the suppression thereof may determine what persons shall be held in military custody as a proper military step.

We scarcely need cite authority to the proposition that this construction of the state Constitution is binding upon all federal courts. It has been so held many times.

Columbus, etc., Co. vs. Wright, 151 U. S., 470.
Atlantic, etc., Co. vs. Georgia, 98 U. S., 359.
Montana Co. vs. St. Louis, etc., Co., 152 U. S., 160.
Pittsburgh, etc., Co. vs. Backus, 154 U. S., 421.
Pembina, etc., Co. vs. Pennsylvania, 125 U. S., 181.
Spencer vs. Merchant, 125 U. S., 345.
Rasmussen vs. Idaho, 181 U. S., 198.
Murray vs. Louisiana, 163 U. S., 101.
Lombard vs. West Chicago Park Comr's., 181 U. S., 33.
Orr vs. Gilman, 183 U. S., 278.
Missouri vs. Dockery, 191 U. S., 165.

It has been contended, and doubtless will be contended in this court, that the determination of the question of whether a state of insurrection existed in San Miguel county, the declaration of martial law, the suspension of the writ of habeas corpus, the steps to be taken in the course of suppressing an insurrection, if one existed, were matters for the legislative

department of the state, and that the executive department in effect usurped the powers and functions of the legislature. Even if that contention were sound, it cannot benefit plaintiff in error here. The mere fact, if it were the fact, that the executive of Colorado exercised legislative functions, and the further fact, if it were the fact, that the Supreme Court of Colorado incorrectly or erroneously held that the exercise of legislative functions by the governor was proper under the Constitution and laws of Colorado, do not constitute an invasion of any right of the plaintiff in error arising under or guaranteed by the federal Constitution. And for this reason: If a given subject-matter is within the jurisdiction of the state and is within the powers of any of the departments of the government of the state, it is wholly immaterial whether that power is authorized to be exercised by one department of the state government or by another.

In other words, it is for the state alone, free from any federal supervision, to apportion among the state's departments of government any powers which the state has.

To be more explicit, this means that if the Constitution of Colorado vests the executive department of the state with duties which in strictness may be said to be legislative in their character, or, if the Constitution of the state casts upon the executive department the discharge of duties judicial in their nature, this delegation of legislative or of judicial power to the executive department does not present nor involve a federal question, either statutory or constitutional.

In Dreyer vs. Illinois, 187 U. S., 71, this court, speaking through Mr. Justice Harlan, held that a federal question was not presented where, under the Constitution and laws of a state, as construed by the court of last resort thereof, powers might be delegated to one department of the state government which in strictness belong to another. If the power in the given instance was one within the domain of state authority, the question whether such power should properly be exercised by one department of the state government or another was a matter purely of state concern, the court saying on page 84:

"Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, *is for the determination of the state.* And its determination one way or the other can not be an element in the inquiry, whether the due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the *whole* power of one of these departments should not be exercised by the same hands which possess the *whole* power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.' (Story Const., 5th Ed., 393.)

"Again: 'Indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.'"

Mr. Justice Harlan added:

"The objection that the act of 1899 (state statute) confers upon executive or ministerial officers powers of a judicial nature, does not, in our judgment, present any question under the due-process clause of the fourteenth amendment."

To the same effect, see Reetz vs. Michigan, 188 U. S., 505.

The same conclusion was reached by this court in Murray vs. Louisiana, 163 U. S., 101.

And in the earlier case of Satterlee vs. Mathewson, 2 Peters, 380, 413, this court, speaking through Mr. Justice Washington, said:

"There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions * * *. It may safely be affirmed that no case has ever been decided in this court upon a writ of error to a state court which affords the slightest countenance to this objection."

In *Lessee of Livingstone et al. vs. More et al.*, 7 Peters, 469, 546, Mr. Justice Johnson, in delivering the opinion of the court, considered the validity of a special act of the legislature of Pennsylvania, providing for the sale of the landed estate of one Nicholson in satisfaction of the liens of the state held thereon, and in discussing the power so exercised said:

"The objection made to the exercise of this power is, that it is one of a judicial character, and could not exist in the legislature of a country having a Constitution which distributes the powers of government into legislative, executive and judicial.

* * * * * * *

"The power existing in every body politic is an absolute despotism; in constituting a government the body politic distributes that power as it pleases, and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural distribution and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious that every community may make a perfect or imperfect separation and distribution of these powers at its will. It has pleased Pennsylvania, in her Constitution, to make what most jurists would pronounce an imperfect separation of those powers."

And it was held that no provision of the federal Constitution was violated by any distribution of power among the departments of the state, for which the Constitution of the state might provide.

In *Baltimore, etc., Co. vs. Nesbit et al.*, 10 How., 395, this court considered the validity of a special statute of Maryland, setting aside the inquisition of a jury in a condemnation proceeding, which inquisition had been ratified and confirmed by the proper judicial tribunal,—the act, in addition to setting aside the inquisition, ordering a new trial. In holding that the exercise of authority by the state legislature in the premises was not a subject for judicial review by this court, Mr. Justice Daniels, speaking for the whole court, remarked:

"Whether this authority was strictly legislative or judicial according to the distribution of power in the state government, was a question rather for that government than for this court to determine.

"What exact partition of powers, legislative, executive or judicial, the people of the several states, in their domestic organization may or should apportion to the different departments of their respective governments, is an inquiry into which this court would enter with very great reluctance.

"It might seem advantageous to some of the states that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British parliament, and as in some specified instances, in one of the houses of our own national legislature. Should such an organization be adopted by a state, whatever might be thought of its wisdom, where, beyond the body politic of the state, would exist any power to impugn its legitimacy?"

In *Carfer vs. Caldwell*, 200 U. S., 293, 297, in considering an objection that the department of a state government had usurped powers pertaining to another, in violation of the provisions of the state Constitution, Mr. Chief Justice Fuller, speaking for a unanimous court, said:

"But that objection does not 'present any question under the due-process clause of the fourteenth amendment.'"

Citing the Dreyer and Reetz cases, *supra*.

It will probably be conceded that the legislative department of the state of Colorado could lawfully have authorized the governor to do the very things here complained of, and if that be true, then it is not a question of federal concern whether the exercise of the conceded power of the state is, by the Constitution of the state, vested in the executive rather than in the legislative department. If the state of Colorado through any of its departments had the power to cause the arrest and detention complained of, no right of Moyer under the federal Constitution has been infringed merely because the power, under the Constitution of Colorado, was reposed in and exercised by the executive of the state.

We are not, however, to be taken as conceding that the construction placed upon the Constitution of Colorado by the Supreme Court of that state was erroneous. On the contrary,

it was correct. Said Chancellor Kent, in his Commentaries, Vol. 1, page 283:

"The command and application of the public force to execute law, *maintain peace* and resist foreign invasion, are powers so obviously of an *executive* nature, and require the exercise of qualities so characteristical of this department, that they have always been *exclusively* appropriated to it, in every well organized government upon earth."

And Judge Story, in his work on the Constitution, section 1491, observes:

"The command and application of the public force to execute the laws, to maintain peace and to resist foreign invasion, are powers so obviously of an *executive* nature and require the exercise of qualities so peculiarly adapted to this department, that a well organized government can scarcely exist when they are taken away from it. Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted *exclusively* with the power."

A STATE OF INSURRECTION—THE ELEMENTS AND INCIDENTS THEREOF AND THE POWERS AND DUTIES ARISING THEREFROM.

The discussion of this question is entered upon, not because it is essential to the proper determination of the pending controversy, because, under the authorities heretofore cited, the determination of the chief executive of the state that a state of insurrection in fact existed in San Miguel county is *final and conclusive.*

It is the executive department and not the judicial that is charged with the constitutional duty of ascertaining the existence of such state of facts as in legal contemplation constitutes a state of insurrection, and the same department is further charged with the duty and invested with the power of employing the entire military forces of the state, if that be deemed requi-

site, to suppress and stamp out the acts of public disorder either committed or threatened, which constitute a condition of insurrection.

The authorities about to be cited will be called to the attention of the court only for the purpose of disclosing that the term "insurrection" is one in a large measure incapable of exact legal definition, more or less elastic in its meaning, and the constitutional officer vested with the power of ascertaining its existence and exercising the necessary military power and constraint to suppress it, is vested with a broad discretion to be exercised under the exigencies of each particular occasion, as the same may present itself to his judgment and determination.

In volume 11, Am. and Eng. Ency. of Law (1st Ed.), page 356, insurrection is thus defined:

"Insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion."

In the note, insurrection is further defined as "a rebellion of citizens or subjects of a country against its government; a rebellion; revolt; sedition."

Citing Soule's Dictionary of Eng. Synonyms, 226.

In Anderson's Law Dictionary the meaning of the term is thus expressed:

"A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt; see Mob; War."

In note on page 356, volume 11, Am. and Eng. Ency. of Law (1st Ed.), it is further said:

"Popular commotion, sedition and insurrection are all state crimes, even though arising from just causes of complaint."

Judge Grosscup, in his charge to the grand jury, relating to the outbreaks connected with the strike of the American

Railway Union against the railroads hauling Pullman cars (reported in 62 Fed., 828), spoke of insurrection in the following terms:

"Insurrection is a rising against civil or political authority. * * * If * * * any person or persons have wilfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authorities, then the fact of an insurrection, within the meaning of the law, has been established; and he who, by speech, writing or other inducement, assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law. *It is not necessary that there should be bloodshed;* it is *not necessary* that its dimensions should be so *portentous* as to *insure probable success,* to constitute an insurrection. * * * When men gather to resist the civil or political authority of the United States, or to oppose the execution of its laws, *and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents.*"

And this court, in *Hickman vs. Jones,* 9 Wall., 197, 200, in speaking of the late rebellion, remarked:

"In the eye of the law it (the rebellion) had the same properties as if it had been the *insurrection of a county or smaller municipal territory* against the state to which it belonged."

Conversely, "the insurrection of a county or a smaller municipal territory against the state" involves a condition of civil war, possessing all the properties of the late rebellion of the Southern states against the United States government, and the conflict waged by the state military authorities in suppressing it was in no legal sense different from that conducted by the federal government in overthrowing armed rebellion against its authority.

And, again, in the *Prize Cases,* 2 Black, 635, 666.

"Insurrection against a government may or may not culminate in organized rebellion."

In McCargo vs. New Orleans Ins. Co., 10 Rob. (La.), 202, a mutiny on shipboard was held, in legal contemplation, to constitute an insurrection.

Mr. Justice Paine, in *In re Kemp*, 16 Wis., 360, 408, said:

"There may be times in a rebellion when, even in states professedly loyal, and which are not the theatre of war, the atmosphere may become pestilent with treasonable sympathy. There may be well-grounded suspicions of guilt, but no overt act capable of being proved. Sedition and disaffection may be paralyzing the vital powers of the government without, perhaps, violating any known law. There may be probable cause to believe that disaffection is about to develop into actual crime. The rattle of the serpent may be heard in the air, but, owing to the concealment, the exact point at which the blow to crush him should be aimed may not be known. In such cases it may be necessary for the public safety that the government should be permitted to strike swiftly and somewhat at random."

These excerpts disclose that the local conditions which may be tantamount, in legal contemplation, to a state of insurrection and rebellion, are not susceptible of exact technical definition, and, from the very necessity of the case, a wide discretion must be vested in the constitutional power clothed with the authority to recognize and declare the existence of such conditions, and the extent of the use of the military force and means requisite to be called into execution for their suppression.

We have seen that this court has decided that an insurrection, in the legal sense of that term, may be confined to the limits of a particular county, or even a smaller municipal division of the state, and that it does not rise beyond the dignity of an insurrection, where the entire people of one or more states are engaged in active armed opposition to the execution of the laws of the United States, within the limits of the states where such insurrection exists.

This demonstrates that insurrection, when it once exists, supplants, of necessity, the due enforcement by the ordinary civil authorities of justice, law and order. The insurgents, for the time being, are the controlling and dominating force while they are able to make headway against the efforts of the civil

authorities in attempting to restore a condition of public tranquillity.

It follows, logically and in legal contemplation, that when the military force of a state is called out to suppress insurrection, a state of local war exists during the time the forces are in the field. And when a state of war, or its legal equivalent, exists, all civil law—whether constitutional or statutory—is superseded by the martial law, during the time and in the locality affected by the insurrection.

This martial law is a form of law absolutely necessary and the recognition of which is clearly implied by the terms of the Colorado Constitution, which clothes the governor with express war powers incident to the suppression of insurrection through the use of the military force of the state.

This court, in *Ford vs. Surget*, 97 U. S., 594, 604, has said:

"The district of country declared by the constituted authorities, during the late Civil War, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies without reference to their personal sentiments and dispositions."

In 11 Am. and Eng. Ency. of Law (1st Ed.), page 363, the text reads:

"A citizen of a state in insurrection has, legally, no standing in a court of the United States."

The logical inference to be deduced from these authorities is that during the continuance of a state of insurrection in a given county in a state, the inhabitants of such county are, for the time being, to be treated and regarded as insurgents, and as such, until the insurrection is suppressed and the ordinary civil authorities resume their customary functions, the courts of justice of the state can be lawfully closed against the inhabitants residing within such insurgent territory.

We make no such claim in this instance, because it is not necessary for the purposes of this case. We only refer to it as showing the legitimate inferences and deductions which may be drawn from judicial holdings on the subject.

Before concluding this branch of the discussion, and by way of anticipation of what may possibly be urged by counsel for plaintiff in error, we desire to suggest the mere fact that a state district judge, in the county where a state of insurrection has been constitutionally declared by the governor, is permitted to, or may, go through the mere formality of holding court, and assumes to transact judicial business, is in and of itself no criterion as to the inherent validity of the act of the governor, in declaring such county to be in a state of insurrection.

As we have shown, the question of the existence in *fact* of a state of insurrection in the county of San Miguel is, in a legal sense, *res adjudicata*. The governor, the constitutional authority for the decision of that question, has passed upon and decided it, and neither averment nor proof is permissible to impugn the correctness of such determination; nevertheless, we wish now to direct attention to some authorities holding that the mere fact, if such be the fact, that the state district judge of the district including the county of San Miguel may have gone through the form of opening and adjourning court, and the transaction of some judicial business therein, is entirely compatible with the existence of a state of insurrection in such county, requiring the military arm of the government for its suppression.

In *In re Kemp*, 16 Wis., 382, 392, Chief Justice Dixon, with regard to this identical question, said:

"If * * * through the disloyalty of the *civil magistrates*, or the insurrectionary spirit of the people, the laws can not be enforced and order maintained, then martial law takes the place of civil law, wherever there is sufficient military force to execute it."

The concurring opinion in the *Milligan Case*, 4 Wall. (U. S.), 140, thus treated the subject in hand:

"Those courts might be open and undisturbed in the execution of their functions, and yet *wholly incompetent* to avert

threatened danger, or to punish with adequate promptitude and certainty the guilty conspirators. * * * In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebellion, and courts their most efficient allies."

The language used in the majority opinion in nowise conflicts with the conclusions thus announced in the concurring opinion.

We find on page 127 the majority opinion, reading:

"Martial law can never exist where courts are open and in the *proper* and *unobstructed* exercise of their jurisdiction."

Mark carefully the qualifying expressions "proper" and "unobstructed."

Where local judges are either disloyal to the government or act in sympathy with the insurgents, or are so terrorized or influenced, either by the menaces, express or implied, of the insurgents, and the fear of consequences, either personal or political, which the judge may apprehend from such insurgents or their friends, then and under such circumstances local courts are not in "the proper and unobstructed exercise of their jurisdiction," and martial law may become an absolute necessity, notwithstanding the insurgents are willing to permit the farce of the formal opening and closing of courts, and the perfunctory exercise of judicial functions.

In *Bishop on Criminal Law*, volume 1, section 52, the author, in discussing the subject of the rightful exercise of martial law, incidental to the suppression of a state of rebellion or insurrection, distinctly recognized that the mere fact that judges may go through the formalities of opening courts and transacting business is a matter of no significance in determining whether a condition of martial law may coexist therewith, the author saying:

"Martial law is elastic in its nature and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the civil authority, or its touch may be light, scarcely felt, or not felt at all, by the mass of the people, while the courts go on in their ordinary course and the business of the community flows in its accustomed channels."

President Lincoln, during the Civil War, accepted and acted upon the views above expressed, and expressly recognized that the military authorities may permit courts of justice to remain open in the disaffected or disloyal territory, while martial law was, nevertheless, in force therein, at the same time the civil tribunals being subordinate to the military authorities, *Vide*, General Orders No. 100, approved by President Lincoln April 24, 1863, which declared that

"a place, district or country occupied by an enemy, stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law. Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws as far as military necessity requires this suspension, substitution or dictation. The commander of the forces may proclaim that the administration of all civil and penal laws shall continue, either in *whole* or in *part*, as in times of *peace*, unless otherwise ordered by the military authority."

These authorities conclusively establish that the mere circumstance that the civil courts are permitted, either by the insurgents or military forces, to transact ordinary judicial business, is not conclusive upon the question as to whether a state of insurrection does or does not, in fact, exist.

Courts may be open and yet witnesses may be terrorized from testifying to the truth in cases of criminal accusations against the insurgents. Juries may not dare to render an honest and unbiased verdict. The local judges may personally be tainted with the spirit of disloyalty or insurrection.

Where these or kindred conditions exist, the law regards the substance and not the form, and declares that judges will not be permitted, any more than non-official individuals, to aid and abet insurrection, either through fear upon the one hand or

actual disloyalty to the laws upon the other; and the power, and the sole power, to decide these and all other cognate questions of fact, with reference to the legitimate exercise of military force in suppressing a state of insurrection, and thereby *ipso facto* establishing what the courts and commentators recognize as martial law, are matters which devolve solely upon the constitutional authority, to wit: the chief executive, to determine, and when he decides, whether rightfully or wrongfully, his judgment alone prevails, and no other authority can lawfully gainsay it.

Before leaving the present branch of the discussion we desire to call attention particularly to one feature of the Milligan case, *supra*.

It is to be noted that in that case this court took judicial notice of the fact that Indiana was a loyal state, and that its courts had always been open and in the full exercise of their jurisdiction. This is the language of the court at page 121 of the opinion:

"This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances."

Had the conditions of which judicial notice was taken been otherwise, there would have been no basis for the conclusion of the majority of the court in that case. And with respect to this particular matter there is a wide difference between that case and the present. Here the United States Circuit Court took judicial notice of the fact that a state of insurrection existed in San Miguel county, Colorado—as it had done in a like instance, in the matter of the application of Sherman Parker, mentioned in the opinion of the court below. The Supreme Court of Colorado took judicial notice of the same matter in the habeas corpus proceeding, *In re Moyer*, 35 Colo., 159. The legislature of the state recognized the same fact by providing for the payment of the expenses incident to the suppression of that insurrection. Session Laws, 1907, page 411.

The executive of the state found and proclaimed a condition of insurrection to exist. In brief, every department of

the state government of Colorado had knowledge and took notice of a fact known of all men in the state.

As against all this it is alleged in the amended complaint in this case:

"That during all the time of the arrest, detention and imprisonment the courts of the state were open and in the free and undisturbed administration of justice, except in so far as the defendants prevented such courts from administering judicially the laws of the state." (Transcript of Record, page 12, folio 23.)

We submit that this allegation is without force and that it will be disregarded upon demurrer; that no proof in its support can ever be taken.

In support of this we refer to the case of Jones vs. United States, 137 U. S., 214, 215, where, in the course of the opinion delivered by Mr. Justice Gray, the following language of Vice Chancellor Shadwell is quoted with approval:

"Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that notwithstanding there is this affirmation in the bill, I am bound to take the fact as it really exists, not as it is averred to be.

"Nothing is taken to be true except that which is properly pleaded; but I am of opinion that when you plead that which is historically false and which the judges are bound to take notice of as being false, it can not be said that you have properly pleaded, merely because it is averred in plain terms, and that I must take it just as if there was no such averment on the record."

There exists another conclusive reason why the allegation of the amended complaint, to which we have just referred, can avail nothing. It is this: The same rule which forbids the taking of testimony to show the invalidity of an enactment of the legislature, forbids judicial inquiry into the finding of the state's executive touching a matter within the exercise of his discretionary power. As is said by Cooley, in his work on Constitutional Limitations (7th Ed.), page 258:

"And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legis-

lature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which *preclude* an inquiry into the motives of the *governor* in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, *not to the courts, but to the people.*"

THE POSSIBILITY THAT POWER MAY BE ABUSED FURNISHES NO ARGUMENT AGAINST THE EXISTENCE OF THE POWER.

It has been urged, and it may be urged again, that the power claimed for the state's executive—a power which he exercised and in the exercise of which he was sustained by the lower court as well as by the Supreme Court of Colorado—is liable to abuse, and inferentially, if not directly, this is urged as an argument against the existence of the power.

This is an argument which has never received the sanction of the courts; presumably, it never will. However, the language of this and other courts and of eminent text writers upon this subject should always be borne in mind.

In Anderson vs. Dunn, 6 Wheat., 204-226, this court, speaking through Mr. Justice Johnson, said:

"The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger."

And on page 227, id., it is said:

"But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests

and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a *casual conflict with the rights of particular individuals* any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety can not be guarded."

These utterances were employed with reference to the power of the house of representatives in session to adjudge and punish, as a breach of the privileges of the house, and as a contempt of its authority, certain acts committed by the plaintiff in the action which were resolved and adjudged by the house to be in violation of such privileges, and as constituting such contempt.

And in Bailey on Jurisdiction, volume 1, page 309, it is said:

"The suggestion that this power may be abused raises no doubt as to its existence. In the Virginia convention, assembled to adopt or reject the federal Constitution, John Marshall answered this suggestion and anticipated every occasion upon which it may be urged: *'All delegated power is liable to be abused. Arguments drawn from that source go in direct opposition to all government and in recommendation of anarchy.'*"

In Bishop on Criminal Law, volume 1, section 62, the author, in speaking of the powers of the president, under the Constitution of the United States (which are more limited than those of the governor of Colorado), in discussing the particular point in question, says:

"Let not the doctrine be misunderstood. The president may violate law by proclaiming martial law, by extending the

sphere of it too widely, or by causing the weight of it to fall too heavily, but, under our Constitution, the judicial power is not the one to exercise the restraint. The question is not in its nature 'judicial,' and the courts have, under our Constitution, only 'judicial' power. If the judges should attempt it, they could not execute their decree without calling upon the military power; but it, by the Constitution and laws, is controlled in these circumstances—that is, when used for purposes of war—by the president, and he can not command it to operate against himself."

And in section 68, id., it is added:

"But it should allay our apprehensions to reflect that the power of the president as to martial law is not higher than, in our judicial affairs, is exercised by the courts of law throughout the country. If the president may proceed wrongfully, so may a judge. If he may commit an error, so may the highest judges of the land. If a judge may be impeached, so, equally, may be the president. If the judge is bound to proceed, in civil affairs, according to judicial law, so is the president, in martial affairs, bound to proceed according to the law-martial. If it is in the power of the president to ruin a man by violating the law-martial, so, also, it is in the power of the judge to do the same thing by violating the judicial law. If, from an inferior judge, there lies an appeal to a superior, so, also, does there from an order of an inferior military officer to the president. If there are instances in which an inferior military officer may do a wrong which can not find practical redress, so, likewise, there are, in which an inferior judge may do a wrong which can not be redressed by application above. In short, the difference between martial law and the law of the civil tribunals is, that the one is adapted to suppress what the other can not, in a time of rebellion or other war, while the other is adapted to a condition of pure peace. And let us not complain when we find our Constitution to have embodied a wisdom suited to all the emergencies of a nation."

And, as it is clearly applicable to the present discussion, we will again quote from Story on the Constitution, volume 1, section 425, where it is said:

"A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences.

This argument is often used in public debate; and, in its common aspect, addresses itself so much to popular fears and prejudices, that it insensibly acquires a weight in the public mind, to which it is nowise entitled. The argument *ab inconvenienti* is sufficiently open to question, from the laxity of application, as well as of opinion, to which it leads. But the argument, from a possible abuse of a power, against its existence or use, is, in its nature, not only perilous, but, in respect to governments, would shake their very foundation. Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies, which may arise in the progress of events, connected with the rights, duties and operations of a government. If they could be foreseen, it would be impossible, *ab ante,* to provide for them. The means must be subject to perpetual modification and change; they must be adapted to the existing manners, habits and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be left to those who administer the government *a very large mass of discretionary powers,* capable of greater or less actual expansion, according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No Constitution can provide perfect guards against it. Confidence must be reposed somewhere; and in free governments the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise; and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies. Few cases are to be supposed, in which a power, however general, will be exerted for the permanent oppression of the people. And yet cases may easily be put, in which a limitation upon such a power might be found in practice to work mischief, to incite foreign aggression, or encourage domestic disorder."

This court, in Martin vs. Mott, 12 Wheat., page 32, in speaking of the exercise of an identical power, vested in the president, with that which the Constitution of Colorado clothes the governor, said:

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them *all the checks which can be useful to guard* against usurpations or wanton tyranny."

Bailey on Jurisdiction, volume 1, page 303, in commenting on a decision of the Supreme Court of Wisconsin, holding that the inherent constitutional power of a court to punish for contempt could not be affected by any attempt on the part of the legislature to deprive the judiciary thereof, remarked:

"This language, so vigorous and strong, by one of the ablest jurists of modern times, is the logical expression of what of necessity must be the result from our complex system of government. The right of *self-protection* and *self-preservation* lies in the acceptance of this doctrine; and be it said to the credit of many courts, who have not bowed to popular enthusiasm in exciting times or yielded to the 'fear of that monster imagination,' to use the expression of Justice Johnson, they unqualifiedly adhere to the doctrine expressed by Justice Ryan. Thus the Supreme Court of Minnesota (State vs. Court, 52 Minn., 283) declare: 'If the whole chapter 87 (that being the chapter regulating contempts) were swept away, there would remain unimpaired the inherent power of the court to punish for contempt.'"

And on page 312, id., it is said:

"It must have realized that there existed an undercurrent pervading the populace against the exercise of power and authority even by the courts; that restraint upon human action and human utterances was irksome; that the popular vein lay in indirectly giving it countenance. The court, however, was both able and strong. It gave no heed to such influences, but fearlessly, firmly and eloquently declared the law."

* * * * * * *

We can add nothing to the force of the declarations which we have quoted, save, perhaps, to suggest that in case of abuse

of the power claimed for the executive of Colorado there is remedy by impeachment; at the polls; and probably also by action of the president of the United States, under section 5299, U. S. Revised Statutes. There is and should be no other remedy.

NO INVASION OF ANY RIGHT UNDER THE FEDERAL CONSTITUTION IS SHOWN. NEITHER THE ARREST OF MOYER NOR THE ADJUDICATION OF THE LAWFULNESS THEREOF BY THE SUPREME COURT OF COLORADO CONSTITUTED AN INFRINGEMENT OF ANY GUARANTY OF THE FEDERAL CONSTITUTION.

If the present action can be successfully maintained—if the acts of the executive of Colorado and the decision of the Supreme Court of that state can be inquired into by judge or jury in a Circuit Court of the United States, then these things must be true:

First. That since the adoption of the fourteenth amendment to the federal Constitution, a state of the Union is powerless through the action of any or all of its departments of government, to finally ascertain and declare the existence of a state of insurrection within its boundaries, because, whatever action the state may take, federal courts may thereafter inquire and determine for themselves whether the alleged condition of insurrection did or did not exist.

Second. That neither the legislature nor the executive of a state, or both combined, can ever suspend the operation of the writ of habeas corpus within the limits of the state without submitting the necessity and propriety of such action to the final determination of the federal judiciary.

Third. That even though federal courts be of the opinion that a condition of local war or insurrection did in fact exist, yet the propriety and necessity of any particular arrest and detention is reviewable by the federal court, and if in the judgment of that court the military exigency of the situation did not necessitate or require such arrest, damages are to be awarded in a civil suit brought by the person suffering arrest in the federal court, after the suppression of the insurrection.

We submit that no such jurisdiction as must be claimed in order to sustain the present action was ever conferred or

ever intended to be conferred upon the courts of the United States, either by virtue of the fourteenth amendment or by virtue of any legislation pursuant thereto. Indeed, if federal courts are clothed with jurisdiction of such causes as this, the idea of state sovereignty may as well be abandoned for all time; and we cannot believe that any state in the Union would have ratified that amendment had it been even suspected that it gave to the federal judiciary any such power of control and supervision over the acts of the states.

The basis of plaintiff in error's case is the supposed deprivation of liberty without due process of law. The fundamental error in plaintiff's theory of the case consists in a misconception of the right of liberty and an exaggerated view of the extent of the meaning and application of the phrase "due process of law."

It is not every arrest and detention and it is not every interference with the action of the individual that constitutes a deprivation of the right of liberty.

Strictly speaking, no right is absolute. All rights are relative. There is no such thing, either in law or in fact, as unrestrained liberty. Liberty is always held and enjoyed subject to the rights of others, and in the final analysis, "The safety of the people is the supreme law."

Said Mr. Justice Harlan, delivering the opinion of this court in Jacobson vs. Massachusetts, 197 U. S., 11, 26, 27:

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

* * * * * * *

"'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.'"

And on page 29:

"But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

* * * * * * *

"It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger."

The case from which the foregoing quotations are made was one in which certain provisions of the statutes of Massachusetts relating to compulsory vaccination had been attacked as unconstitutional—it being insisted that the statute as interpreted by the Supreme Court of Massachusetts was an invasion of the right of personal liberty.

The case of Jacobson vs. Massachusetts, *supra,* was quoted from and approved in the opinion of the court in Adair vs. United States, 208 U. S., 161, 173, where the court also said:

"Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers (police powers), and with such conditions the fourteenth amendment was not designed to interfere."

In his lectures upon the Constitution, Mr. Justice Miller said (page 349):

"It is true that the executive may, under certain circumstances, invade the personal rights of the individual as regards his liberty. It has been done in cases of emergency; it may be done again. The privilege of the writ of habeas corpus may be suspended, when, in cases of rebellion or invasion, the public safety may require it. The president, or the executive officers, may order a man into imprisonmnt, provided the necessity of the case warrants such action. But in all these cases

they are bound to be careful to exercise their power within the law."

And the defendants in error did "exercise their power within the law."

Due process of law does not invariably require judicial proceedings. This is illustrated by the decision of this court in the recent case of United States vs. Ju Toy, 198 U. S., 253, 263.

In that case the act of congress, vesting the secretary of commerce and labor with the power of finally determining whether persons of Chinese descent seeking to enter the United States are in fact citizens of the United States, was under consideration. The question presented was whether the decision of the secretary of commerce and labor was conclusive. In holding it to be so, Mr. Justice Holmes, delivering the opinion of this court, said:

"If, for the purpose of argument, we assume that the fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we, nevertheless, are of opinion that with regard to him, due process of law does not require judicial trial. * * * That the decision may be entrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in:" etc. (Citing a number of cases.)

Adding:

"It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court, in Murray's Lessee vs. Hoboken, etc., Co., 18 How., 227, 280, to show that the requirement of a judicial trial does not prevail in every case."

In Public Clearing House vs. Coyne, 194 U. S., 497, the following language appears in the opinion of Mr. Justice Brown:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. * * * As was said by Judge Cooley in Weimer

vs. Bunbury, 30 Mich., 201: 'There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

The Supreme Court of Illinois, in Donahue vs. County, 100 Ill., 94, 108, uses this language:

"It may, in many cases, be a matter of difficulty to determine the precise line which divides the executive and judicial functions. It has been said that where the functionary hears, considers and determines, then he performs judicial acts. This definition is not strictly accurate. Take, for instance, an election board. It examines the ballots, counts, determines and certifies the result. The county clerk, and the persons he called to his assistance, examined the returns from the various towns, ascertained the result, declared and certified that appellant was elected, and on that certificate he was commissioned, and yet no one supposes they exercised judicial functions. They, however, heard, considered and determined, as much as did the board, in auditing appellant's accounts and ascertaining he was in default. Had he died, they would have heard, considered and decided. So, had he removed from the county. Had he failed to file his bond and oath the board would have been required to hear, consider and determine, and so, had he become insane, and yet no one would be inclined to say there was the exercise of judicial functions in each of these cases; and yet, the action would, in a degree, have been the same. There is, in every ministerial or executive act, a necessity for the hearing of evidence, a consideration of the evidence, and a determination based on it. When the governor determines to call out the militia to suppress an insurrection, it is upon evidence of the existence of the fact, the consideration of the question of whether the emergency exists requiring him to act, and upon that evidence he decides the question—and this, too, although the emergency is asserted on one side and denied on the other, and the evidence may be contradictory. So it is seen the definition is by no means accurate. It embraces cases that are not judicial, and, hence, is too comprehensive."

In Nishimura Ekiu vs. United States, 142 U. S., 651, 660, Mr. Justice Gray, speaking for the court, said:

"But, on the other hand, the final determination of those facts may be entrusted by congress to executive officers; and in such a case, *as in all others,* in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

The courts recognize that there exists a well-defined distinction between the power to try, convict and punish for violation of a penal statute, and the power to arrest and hold as preliminary to further proceedings.

The exercise of the one power in times of peace is judicial in its nature, while the exercise of the power to arrest and commit may be lawfully delegated to non-judicial officers without transgressing constitutional provisions.

State vs. Le Clair, 86 Me., 522.

Allor vs. Wayne, etc., 43 Mich., 86, 100.

Daniels vs. People, 6 Mich., 381, 388, 389, 390.

In the case at bar it is not alleged that the defendants assumed to try, convict or punish the plaintiff. They but held him in military custody for a reasonable period as a measure which, in their final judgment and in the exercise of political and executive discretion, was essential for the public safety, and the success of the efforts of the military forces of the state to restore public tranquillity. What was done constituted a lawful exercise of power, invaded no constitutional right and gives no right of action.

In re Bergen, 2 Hughes (C. C.), 513, 517.

MOTIVES OF THE GOVERNOR OF COLORADO IN THE DISCHARGE OF HIS CONSTITUTIONAL AND POLITICAL DUTY OF SUPPRESSING AN INSURRECTION ARE NOT REVIEWABLE IN ANY JUDICIAL TRIBUNAL.

It is alleged and urged that the governor of Colorado, in directing the arrest and detention of plaintiff in error, acted without probable cause and from wanton and malicious motives and that for this reason his acts are properly the subject of judicial inquiry.

In answer to this we submit the law to be that the court below has no power to enter upon any inquiry as to the motives of the executive of the state, acting officially. This we take to be the rule as expressed by this court in the opinion in the case of Louisiana vs. Texas, 176 U. S., 1, 18, where Mr. Chief Justice Fuller said:

"Nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, *or of the chief magistrate of a state,* in *enforcing* it, in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives."

The same subject was considered and the same rule announced in Spaulding vs. Vilas, 161 U. S., 483.

Chief Justice Marshall, in the early case of Brown vs. Maryland, 12 Wheat., 419, 439, 440, said:

"Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised *at all,* it must be exercised at the will of those in whose hands it is placed."

The facts involved in the case at bar and the law applicable thereto find a close parallel in the leading case of *Luther vs. Borden,* 7 Howard, 1, 43.

That case grew out of the Dorr rebellion. It was an action of trespass brought against a military officer for damages claimed to have been suffered to property. The language of

the opinion of Mr. Chief Justice Taney applies with peculiar force. Among other things, he said:

"After the president has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented the majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the president had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the president was endeavoring to maintain. If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy and not of order. Yet, if this right does not reside in the courts, when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It can not, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful."

In the later case of *Mitchell vs. Harmony,* 13 How., 115, the right of recovery against an official under the special circumstances of the case was recognized, but the chief justice was careful to strictly limit that right of recovery, saying, on page 137 of the opinion:

"If the power exercised * * * had been within the limits of a discretion confided to him by law, *his order would have justified the defendant, even if the commander had abused his power, or acted from improper motives.*"

The italicized words (the italics are ours, as is the case throughout this brief) are significant.

The acts complained of in the case at bar were the acts of the commander-in-chief of the military forces of Colorado and the supreme executive of the state. They were acts committed in the exercise and within the limits of the discretion confided in him by law; and in such cases the opinion of the Chief Justice recognizes the rule of law to be, that even though

the power of the executive was abused, or the acts complained of were committed with improper motive, yet no recovery is permissible in an action for damages and no judicial investigation of the matter can be had.

We feel that the case of *Mitchell vs. Harmony, supra,* has been modified by subsequent decisions of this court.

In *Dow vs. Johnson,* 100 U. S., 158, 169, 170, two propositions of law were announced:

First: That in times of war, acts performed under military authority would never subject persons committing the same to liability in the courts of justice, either civil or criminal; and

Second: That the constitutional guarantees of personal liberty are wholly suspended during the existence of a state of belligerency. We quote from the opinion at some length:

"This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the confederate army, when in Pennsylvania, as to members of the national army when in the insurgent states. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. * * * We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of Mitchell vs. Harmony, reported in the 13th of Howard; on the contrary, we approve it. But it has no application to the case at bar."

And on page 170, it is said:

"The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering

country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field of the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

In the later case of Freeland vs. Williams, 131 U. S., 405, 416, this court, speaking through Mr. Justice Miller, in reference to Dow vs. Johnson, supra, said:

"The doctrine has been settled in the courts * * * that for an act done in accordance with the usages of civilized warfare, under and by military authority * * * no civil liability attached to the officers or soldiers who acted under such authority."

Druecker vs. Salomon, 21 Wis., 628, 633, 635, is an instructive case. There it was attempted to hold the governor of the state personally liable in damages in an action for false imprisonment.

The case arose during the Civil War. The governor, in his executive capacity, ordered the arrest of the plaintiff, and caused him to be detained for the period of twelve days by the military forces of the state—this action being justified as a necessity in the suppression of a riot against the authority of the state growing out of resistance to a draft order.

The defendant was adjudged to be exempt from personal liability, and the propositions relied upon in the case at bar were upheld. Brief quotation from the opinion of the court will suffice to show the applicability of the rules of law there announced to the case at bar:

"Although there must be force used (to resist the execution of the law), it is not *necessary* that there should be any *military array or weapons.* The crime may be committed by those *not personally* present at the immediate scene of violence, if they are leagued with the conspirators and *perform any part, however minute.*"

* * * * * * *

"An exemption similar to that of judges from actions for their judicial acts is extended to officers in the other depart-

ments of government whenever they are entrusted with the exercise of discretionary power, *and their determinations or decisions are, in their nature, judicial.*"

Again, on page 637, the court said:

"If his (the military officer) orders were *general,* to go with military forces into an insurrectionary district and quell the insurrection, he would be clothed with authority *discretionary* and in its nature *judicial.*"

On the question of the power of the governor to detain the plaintiff in military custody, the court, on page 638, said:

"He (the governor) had a right to detain the prisoners, including the plaintiff, *so long as in his judgment* was necessary to prevent the further obstruction of the draft, and until they could be safely turned over to the civil authorities for trial."

We deem it unnecessary to review or to comment upon the few cases in which the courts have permitted recovery of damages for trespasses committed by subordinate military officers. Even in the few cases of this kind, it is to be noted that wherever recovery has been allowed for acts committed by military officers in times of war or in the suppression of insurrection, the defendants were inferior officers acting either without any authority from the commanding officer or in absolute violation of his commands. In no instance in the history of the law in this country has there been a case where military officers, acting under the express sanction of the commander-in-chief in time of war or public disorder, have been subjected to liability in the civil courts for acts so done.

If redress is to be had for military interference with liberty or with property, where damage is claimed to have been suffered unnecessarily or through wantonness, such redress must come from the state or from the government in the form of indemnity by action of the legislature, and not through the judgment of the courts.

THE DECISION AND JUDGMENT OF THE SUPREME COURT OF COLORADO IN THE HABEAS CORPUS PROCEEDING IS A BAR TO THE MAINTENANCE OF THE PRESENT ACTION.

Even if it should be held that the subject-matter of the present action is within the jurisdiction of the Circuit Court and that the amended complaint states facts sufficient to constitute a cause of action, yet, upon the whole record, it is manifest that the plaintiff can not recover. The adjudication of the Supreme Court of Colorado in the habeas corpus proceeding constitutes a bar.

All of the essential elements calling for the application of the rule of *res adjudicata* are present. Plaintiff in error had his day in court; he litigated the lawfulness of the identical arrest and imprisonment upon which the present action is sought to be founded; the same parties were before the court; the court was a court of competent jurisdiction and the plaintiff in error is bound by the adjudication already had.

In other words, we submit:

First. That the habeas corpus proceeding was a civil suit, having for its purpose a judicial inquiry and determination of the lawfulness of the identical arrest and imprisonment here complained of.

Second. That the parties to this action and to the habeas corpus proceeding, both plaintiff and defendants, are identical. The plaintiff here was the petitioner there; the defendants Bell and Wells were the defendants in the other proceeding, and the defendant Peabody, in effect, intervened in that proceeding, and by his own action became a party thereto, ratifying, adopting and asserting the lawfulness of, and taking the responsibility for, the acts of Bell and Wells in taking and retaining custody of the plaintiff.

Third. That there exists identity of subject-matter and cause of action. In the former suit the issue was as to the alleged unlawfulness and unconstitutionality of plaintiff's arrest and detention. This is the issue tendered in the present suit. If that arrest was lawful and constitutional, there is no

right to maintain this action, and the lawfulness and constitutionality of that arrest was the precise point decided by the Supreme Court of Colorado in the former suit.

In principle, and upon authority, the concurrence of the elements mentioned bars recovery here.

In the habeas corpus proceeding Moyer asserted the same rights which he here asserts. He relied upon the same guaranties of the federal Constitution upon which he relies here. The Supreme Court of Colorado had the power, and upon it was imposed the duty, of determining whether the arrest and imprisonment complained of were in violation of any provision of the federal Constitution.

Robb vs. Connolly, 111 U. S., 624. 637.

Minnesota vs. Brundage, 180 U. S., 499.

Arkansas vs. Kansas, Etc., Co., 183 U. S., 185.

In short, the Supreme Court of Colorado had full jurisdiction to hear and decide in the habeas corpus proceeding every question, both of law and of fact, which is involved in this suit.

It has been decided that a habeas corpus proceeding is a civil suit brought for the enforcement of a purely civil right.

Ex parte Tom Tong, 108 U. S., 556.

Cross vs. Burke, 146 U. S., 82.

The subject is elaborately discussed in State vs. Huegin, 110 Wis., 189.

We feel entirely justified in saying that for all purposes, including the application of the doctrine of *res adjudicata*, a habeas corpus suit is a civil action to enforce a purely civil right, and that all the consequences and attributes of ordinary suits are present and applicable to a suit of that nature.

In other words, that a judgment in a habeas proceeding possesses the same attributes as to finality and conclusiveness applicable to a judgment in any ordinary form of action.

We are aware that some of the earlier decisions seem to announce conclusions at variance with our contention and to hold:

First. That a judgment in a habeas corpus proceeding which results in the discharge of the petitioner is res adjudicata in his favor. That is to say, that no other court can subsequently question the conclusiveness of the judgment determining the imprisonment to be in fact illegal.

Second. That a judgment in a habeas corpus proceeding involving the custody of children is final and conclusive.

Third. That, nevertheless, a judgment in a habeas corpus proceeding refusing to discharge the prisoner is not *res adjudicata,* upon the theory that no appeal lies therefrom, and that such a judgment can not be reviewed.

In our opinion, these decisions are indefensible in principle. While recognizing the conclusiveness of the judgment in favor of one of the litigants, they yet deny an equal conclusiveness to the other litigant when the judgment is in his favor. They treat a judgment as not binding or conclusive, merely because no appeal or writ of error will lie. This reason no longer exists.

In Colorado the conclusiveness of adjudication in habeas corpus proceedings is established by statute.

See,

1 M. A. S., section 2110.

Under section 709, United States Revised Statutes, this court had jurisdiction to review the judgment of the Supreme Court of Colorado in the habeas corpus proceedings. The cases upon this point are referred to in *In re Dowd,* 133 Fed. Rep., 747.

The right of review existing, the judgment in a habeas corpus proceeding is placed upon the same footing as to conclusiveness as any other judgment in any other civil action or proceeding.

Perry vs. McLendon, 62 Ga., 598, 603.

Miller vs. State, 43 Tex., 579, 580.

State vs. Huegin, 110 Wis., 189.

State ex rel. Gaster vs. Whitcher, 117 Wis., 668.

Castor vs. Bates, 127 Mich., 285.

The case last cited goes to the extent of holding that the imprisonment complained of having been held to be illegal, and the prisoner having been discharged as the result of a habeas corpus proceeding brought by him, the defendant in an action to recover damages for false imprisonment could not be heard to litigate anew the question as to whether the original imprisonment was lawful or unlawful.

It is not essential to the application of the doctrine of res adjudicata that the original and succeeding suits should be of the same technical character or form. The controlling element is the determination in the first suit of a question vital and decisive in the second suit, regardless of the legal classification of either action.

The rule is, that a judgment in a former suit is conclusive in a subsequent suit between the same parties, or their privies, though upon a different cause of action, if the issues presented in the second suit were involved and fully determined in the first.

New Orleans vs. Citizens Bank, 167 U. S., 371.

We claim for the judgment of the Supreme Court of Colorado in the habeas corpus suit absolute finality, for every purpose save for the purpose of review by this court, had the same been seasonably brought here upon a writ of error.

Nor is the conclusive effect of the judgment of the Supreme Court of Colorado in the proceeding there affected by the circumstance that the petitioner was released from the custody complained of before his cause could have been finally heard and determined in this court in regular course.

See, *In re Dowd, supra,* where Judge Sanborn, rendering the opinion of the Circuit Court of Appeals (page 754), said:

"The fact that the hearing and decision of his (petitioner's) case by the Supreme Court, under a writ of error, can not be had until the term of his imprisonment would expire, has been determined in Markuson vs. Boucher, 175 U. S., 184, to present no exception to the general rule."

IN CONCLUSION.

This case is without exact precedent, but of first importance. It involves a broad question and a vital principle of government. It will serve to define, in part at least, the limits of interference by and control of the federal judicial department over, state executive action.

In other words, it is to be determined whether the state is to be sovereign in matters of the maintenance of law and order within its boundaries; whether it is to be denied the inherent right of self defense; whether the relations of the state and national government have become or are to become radically changed; whether this is a union of sovereign states or whether an aggregation of petty geographical entities, destitute of the ordinary powers and functions of an established government.

The same element of society which raises the voice of protest when the state maintains its authority and enforces obedience to law and respect of property rights, cries out with indignation when the power of the federal government is put in motion to quell riot and suppress violence within a state.

Somewhere there is lodged a supreme power of organized government—of society—ample to enable it to defend itself against the rule of the mob. We assert with all confidence that under our system and theory of government that power rests primarily with the state. With the power goes the duty.

The record here shows that Colorado and Colorado's executive discharged their duty under adverse conditions, lawfully and with fidelity. Out of that performance of duty came the arrest of plaintiff in error. Out of that arrest there arises no right of action, no ground of federal interference, no excuse for creating a precedent which would be freighted with grave consequences for the future.

If to-day the chief executive of a state of the Union may be compelled to respond in damages because his executive action fails to receive the sanction of a judge or jury in a court of the United States, then to-morrow a federal judge may restrain and control executive action in advance.

It is needless to say that the framers of our Constitution had no dream of such a possibility. That the adoption of the

fourteenth amendment was had without the conception of any such thing.

The constitutional rights of the individual are sacred. They must be preserved. But it is to be at all times remembered that the constitutional rights of the individual do not rise higher than the fundamental rights of organized society. The valued right of individual liberty is not the right to be free of all restraint, not the right of unbridled license. Society knows no rule of the individual will.

We submit that the plaintiff here has misconceived his rights; misconceived the duty of the state; misconceived the duty of the state's executive; misconceived the meaning of liberty; misconceived the functions and jurisdiction of the federal judiciary, and that he has founded the present proceeding upon these misconceptions.

The judgment of the court below was right and should be affirmed.

Respectfully submitted,
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